A significant concern in capital trials is the formidable obstacles impeding the jurors' ability to consider defense mitigation evidence at sentencing. Race, economic status and guilt phase fact contamination impose are weighty barriers to due consideration. Co-author Brewer's groundbreaking empirical study analyzing the perceptions capital jurors form about the defendant offers new and revealing insight about how jurors' perceptions of capital defendants are shaped and how they bear on the jurors' life or death decision. This article sets forth the study and its conclusions and explores efforts that can be taken by defense counsel to implement the findings in overcoming the barriers to juror consideration of mitigation evidence.

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I. INTRODUCTION

A message falling on unwilling ears is impotent. [FN1] Persuasion is dependent on the audience's willingness to listen. [FN2] These hard realities often render the sentencing phase of capital trials a sham. The sentencing phase, when jurors are presented with both aggravating and mitigating evidence, is the true battleground of most capital cases. [FN3] It is then that jurors make their life and death decisions. [FN4] However, it has always been a significant concern by those steeped in death penalty litigation that barriers such as race, [FN5] economic status, [FN6] and guilt phase contamination inhibit consideration of mitigation evidence by capital jurors. [FN7] If capital jurors will not listen they cannot be persuaded. While race and economic status are somewhat self-descriptive, juror contamination occurs when the same jurors who deliberated and convicted on the facts presented during the guilt phase become contaminated by those negative facts and are thereafter unable or unwilling to consider mitigation evidence during the sentencing phase. [FN8] Given the significant barriers to juror receptivity of mitigation evidence, it could well be that the purpose of the sentencing phase has been eviscerated. [FN9] This article shall examine the barriers to juror receptivity of defense mitigation evidence and the efforts that might be undertaken to overcome those barriers. It will particularly focus on the extent that the jurors' perception of the defendant as viewed through the attorney-defendant relationship affects their willingness to consider mitigation evidence.

The first step in overcoming the barriers to the consideration of mitigation evidence is getting jurors to take the measure of a defendant as an individual rather than some mean stereotype. [FN10] Jurors cannot be left to view the defendant as simply the evil doer of the vicious acts set forth during the guilt phase. Nor can they be left to view the accused as only a Crip or an Aryan Brother, as a Hispanic or an African-American, as a Muslim or a Jew, as a poor man or a billionaire. While students of capital trials would readily agree with the foregoing, the devil remains in the doing. There are a number of methods that can be employed to overcome the barriers that inhibit capital jurors from considering mitigation evidence. At the foundation of those efforts may be the jurors' perception of the defendant's character as displayed by his relationship with his lawyer. [FN11]

A significant sampling of capital jurors reveals that jurors are more receptive to mitigation evidence when they view the relationship between the attorney and client as “warm and friendly.” [FN12] Ironically, that same study of capital jurors revealed that they became less receptive if they perceived that the attorney and client worked too closely together. [FN13] From the jurors' perspective, a “close” relationship generated a sense that they were being manipulated. [FN14] This article carefully explores the results of this study to learn how and why capital jurors take guidance from their perceptions arising from the attorney-client relationship. Building from that study we will endeavor to describe measures that may be employed by defense counsel to “warm” jurors to their client and break down the stereotypic wall of fear and loathing that typically inhibits capital jurors' receptivity to mitigation testimony. [FN15]
Before turning to the study and its finding, we set forth the constitutionally necessary and critical function of the sentencing phase in American death penalty jurisprudence: when the penalty phase has been rendered a foregone conclusion due to capital juror indifference to mitigation evidence, the constitutionality of the death penalty itself is compromised. [FN16] Next, we will identify the nature and extent of the barriers to jurors’ consideration of mitigation evidence and analyze the attitudes that trigger juror antipathy toward the accused. Then, we will turn to an analysis of the study of juror perceptions of the attorney-client relationship which must necessarily impact the advocacy efforts of those defense lawyers who practice in the rarified atmosphere of death penalty litigation. And finally, we conclude by analyzing how the study’s findings may suggest methodologies that counsel can employ to “warm” jurors to capital defendants without giving rise to juror concerns of being manipulated. It is that tightrope, appearing “warm” but not too “close,” that defense counsel must walk.

II. THE CONSTITUTIONAL NECESSITY OF CONSIDERING MITIGATION EVIDENCE DURING SENTENCING DELIBERATIONS

A constitutionally adequate sentencing phase is an absolute requirement of all capital sentencing schemes; should this component be rendered vacuous, the death penalty fails in its constitutionality. [FN17] However, while acknowledging the importance of sentencing as a constitutionally necessary and critical component of America’s various death penalty schemes, it is not the intent of this essay to focus on the constitutionality of the death penalty. Rather, the goal is to acknowledge the critical function of sentencing in death penalty jurisprudence and inquire whether that function is being satisfied in light of capital jurors’ failure to consider mitigation evidence. There is no question that death is different. [FN18] It is final and irrevocable. [FN19] It rejects any possibility of rehabilitation. [FN20] It terminates the rights and, indeed, the very existence of a person. [FN21] It is the ultimate punishment, in a class by itself, different in kind than any other punishment. [FN22] Consequently, the Supreme Court has struggled mightily with the methodology undertaken to ensure that capital sentencing does not violate the Eighth and Fourteenth Amendments [FN23] and that its imposition is race and gender neutral, [FN24] recognizing that death sentences must be reserved only for those particular and extreme circumstances meriting the ultimate punishment. [FN25]

While capital jurors’ values and beliefs coupled with the irremissibility of the death qualifying act may outweigh mitigation evidence leading to a death sentence, due consideration and transparency of process has been consistently mandated by the Supreme Court. Nor does the Court’s emphasis on the value of mitigation evidence end once the matter has been proffered to the jury. [FN26] In Buchanan v. Angelone, the Court stressed that “the sentencier may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence.” [FN27] The consideration of mitigation evidence is so inextricably linked to the constitutionality of a capital trial that the Supreme Court has referred to it as simply “part of the process.” [FN28] As a consequence, jurors that refuse to consider mitigation evidence must be dismissed with cause. [FN29] The constitutional imperative is a reflection of what experienced capital trial attorneys have long appreciated: effective presentation of mitigation evidence is all too often the only thing standing between the defendant and death. [FN30]

III. BARRIERS TO MITIGATION EVIDENCE

While a meaningful sentencing evaluation is constitutionally mandated in capital cases, the reality of any meaningful evaluation is anything but certain given the imposing barriers impeding consideration of mitigation evidence. [FN31] The factor that may well dictate whether the life of the accused will be spared is the extent to which capital jurors view the defendant as a flesh and blood human being, rather than through the lens of some pejorative stereotype. [FN32] By personalizing, “humanizing” or “warming” the defendant to the jurors, the defense attorney may forestall an execution. [FN33] That is not to say that simply because the defense has succeeded in personalizing the accused he will not be sentenced to death, but rather that personalization is a seeming prerequisite to that result. [FN34] Consideration being the first step to acceptance, the focus here is on the jurors’ simple consideration of mitigation evidence despite a strong countervailing
predilection against doing so. [FN36] Thus, the purpose of this essay is modest: getting capital jurors to consider mitigation evidence.

A. Recognizing the Barriers

Preliminary to the goal of facilitating juror consideration of defense mitigation evidence is the broader goal of breaking through the barriers that inhibit capital jurors from such consideration. Instrumental to overcoming these barriers is giving the jurors a view of the defendant apart from that proposed by the prosecutor or perhaps even by the facts; a view that personalizes the accused. Intuitively, the notion of personalizing the accused is appealing. History has proven that when a person is viewed negatively, such as a witch or a terrorist, the most humane among us can lack the empathy, [FN37] the sympathy, [FN38] and the solidarity [FN39] necessary to view such an individual as a person, an equal [FN40] or even as a life worth consideration. [FN41] When a person is defined as outside the community, their life no longer has the same *201 worth as one who is within the community. [FN42] Dehumanization proves to be one of the most powerful cognitive processes that can distance people from the moral implications of their actions. [FN43]

Reaching across this divide and “humanizing” a capital defendant does not excuse the defendant's crime, but instead places it within the greater context of the defendant's life. [FN44] Yet the legal process is not conducive to the development of empathy or sympathy. [FN47] Many point fingers at the formal and cold trials, the poor representation, and the distorted or even stereotypical perception of the accused. [FN50] Other studies suggest that some capital jurors did not believe their life and death decision would be acted on, while others saw only a monster deserving of punishment by the end of the guilt phase. [FN51] Typically, jurors do not self-consciously link empathy and solidarity to the sentencing decision of the accused. [FN53] And without moral awareness, the accused is merely a faceless snapshot of violence.*202 If the defense makes no effort to humanize the accused, then the jurors will ride the persuasive and sometimes misunderstood messages of society. [FN55]

There are few words that can adequately convey the complexity of the barriers that arise in trying to personalize or humanize the accused, and there are few answers to why one capital defendant lives and another dies. There is a unique psychological state that capital jurors must have while contemplating the sentence of death, and this mental state must be understood by defense counsel to gain some measure of receptivity to the defense message.

B. Race as a Barrier

Any discussion of the barriers impeding jurors' ability to view the accused as a person begins with race. [FN56] Race has always been the great divide. [FN57] Disdain by members of the majority toward people of color transcends the origins of the country. [FN58] Lynch law traces its roots to the American Revolution. [FN59] And while African-Americans *203 have traditionally borne the brunt of this racial animus, other people of color such as Hispanics, Asians and Middle Easterners labor under similar yokes. [FN60] What is it that causes so many in the majority culture to view and treat “others” differently? [FN61]

It appears typical for an individual to recognize facial differences between themselves and “others.” [FN62] This sense of “otherness” generates a vast host of societal problems, none more acute than the treatment of “others” in the American criminal justice system, and most specifically in capital cases. [FN63] Whenever a member of the “other” group commits a crime, it becomes more terrifying to the majority because it
was committed by one of the “others” and harsh punishment appears increasingly necessary. [FN64]

Consequently, there is an “empathetic divide that exists between many white jurors and African-American defendants.” [FN65][FN65] Racism originates from anger, hatred, fear, and ignorance and is facilitated when people are dehumanized. [FN66][FN66] A sentence of death may often originate*204 from the same emotions. [FN67][FN67] Historical data exemplifies race's impact in capital punishment, and highlights the disproportionate number of death sentences received by African-Americans. [FN68][FN68]

Further complicating a complex issue is the race of the victim. The victim's race and the offender's race create a subconscious impression on a juror's decision to recommend life or death for a particular defendant. [FN69][FN69] The Supreme Court has taken note of the fact that “violent crimes perpetrated against members of other racial or ethnic groups often raise [a reasonable possibility that racial prejudice would influence the jury].” [FN70][FN70] Jurors enter the sentencing phase with preconceived notions developed before and during the guilt phase, such as pre-existing stereotypes, as well as “evidence presented during the guilt and deliberation phase of the trial, and possibly from external sources (e.g., pretrial publicity).” [FN71][FN71] Additionally, research indicates that “jurors undergo two independent processes when reaching a sentencing position before sentencing deliberations even begin - victim evaluations [FN72][FN72] and defendant attributions.” [FN73][FN73]

*205 1. Victim Evaluations

Although empathy, or lack thereof, towards the defendant affects how capital jurors will evaluate the defendant, victim empathy has a far greater influence on the capital decision making process. [FN74][FN74] When victim empathy is high, jurors will evaluate the defendant less positively and are more likely to reject mitigation evidence. [FN75][FN75] Studies suggest that the murder of a “positively evaluated” victim is likely to result in greater support for a death sentence. [FN76][FN76] There are two closely intertwined factors which result in a positive victim evaluation: empathy and racial similarities. [FN77][FN77] First, victims are evaluated more positively when empathy is high. [FN78][FN78] A juror who imagines being in the victim's situation empathizes with the victim and is more likely to view the defendant with anger and disgust. [FN79][FN79] “So long as race remains an important part of individual identity, empathetic reactions will be more common and more intense between members of the same racial group than between members of different racial groups.” [FN80][FN80] Second, anecdotal evidence suggests that jurors evaluate members of their own racial group more positively than victims who were members of a different racial group. [FN81][FN81] Individuals tend to view members of their group as being like them and less capable of committing gruesome crimes. [FN82][FN82] Nonetheless, the individual juror knows that someone committed this crime and labels the perpetrator as the “other.” [FN83][FN83] Logically, it appears that murderers of white victims suffer a higher probability of being sentenced to death when the defendant's life is in the hands of white jurors. [FN84][FN84]

2. Defendant Attributions

A defendant's race affects the image attributed to him by a juror and a racial gap between the defendant and a juror influences the way they evaluate mitigation evidence. [FN85][FN85] For instance, from a white juror's perspective, “information on substance abuse, psychiatric problems and childhood abuse was regarded as significantly less mitigating” for the black defendant than the white defendant. [FN86][FN86] In fact, such mitigation evidence seemed to support a white juror's negative image of black defendants. [FN87][FN87] Jurors tend to “discard evidence that is incongruous with their preconceived notions of the defendant.” [FN88][FN88] Thus when a defendant is black, a white juror is more likely to discount mitigating evidence and less likely to empathize with the defendant. [FN89][FN89]

Instinctive race-based bias by white jurors towards black defendants may be moderated by the composition of the jury. [FN90][FN90] The “black male presence effect” occurs when an African American sits on the *207 jury.
By interacting with a black, a white juror's bias diminishes, as does the likelihood of a death sentence. A ten-year study found that the presence of a single black juror reduced the death sentence for African-American defendants from 72% to 43%. 

“All else being equal, white jurors are more apt to vote for death than are black jurors” when the defendant is black. It follows then that while white jurors are less likely than black jurors to find an African-American defendant likeable as a person. Not surprisingly, black jurors were found more likely to view a black defendant as likeable and appear more willing to keep the “sin separate from the sinner.” In fact, regardless of the defendant's race, “[b]lack jurors were more likely than white jurors to have imagined being in the defendant's situation and even to have imagined actually being like the defendant,” thus reducing the “empathetic divide.”

C. Economic Status as a Barrier

As suggested earlier, economic status may also serve as a barrier to capital jurors' consideration of defense mitigation evidence. This, despite the fact that jurors are typically unaware of a defendant's economic status in most criminal prosecutions. Under the pressure of courtroom scrutiny, defendants tend to act in a more or less similar fashion and even dress in a similar fashion, thereby generally blunting economic distinctions. Apart from attire or jewelry or perhaps the particular facts of a case in which economic status becomes clear, the only other indicator of economic status may be the identity of the lawyers. If a defendant's lawyer is a public defender or is court appointed, that would be a clear indication of economic status. However, for the most part, the fact that a lawyer is court appointed is generally not communicated to the jurors, and in practice, most court appointed lawyers take pains in concealing their status from the jurors. That said, capital cases often arise from factual scenarios involving gang and street violence and other similar underlying factual settings, which are typically associated with individuals of lower economic status. Consequently, the jurors will probably reach conclusions about the defendant's economic status based on those factual scenarios.

While there is no succinct and clear definition of a class system in America, there is compelling evidence that economic status has ramifications for the capital defendant. The use of a three-tiered class system model employing “rich,” “middle-class,” and the “poor,” may not fully assess a society so economically fragmented. Most models represent versions of a scale in which the middle class is divided into the “upper-middle class,” the “middle-middle class,” and the “lower-middle class.” However, it has been suggested that the American social structure is so complex that application of a model including dozens of classes is justified. Regardless of how these “classes” are broken down and identified, it is undeniable that America's class structures are a considerable factor in the criminal justice system, particularly in death penalty prosecutions. However, a defendant's socioeconomic status is unlikely to have a direct effect on the jury. In other words it is unlikely that jurors will convict a poor man simply because he is poor. Rather, the impact is indirect and is reflected through the trial judges and defense attorneys. Indeed, it is somewhat surprising that socio-economic status could affect judicial behavior, which in turn indirectly impacts juror behavior. Judges are not automatons. Despite their idealized role as neutrals, they form opinions about the guilt or innocence of defendants being tried before juries in their courtrooms. The development of opinions by judges is basic to human nature and are irrelevant only to the extent that they are carefully tucked away beneath judicial robes. But, are those opinions always tucked away? Or, is it possible that these neutrals subtly communicate their opinions to the jury and in so doing influence them? A 1985 study examined that question and concluded that judges were more likely to infer guilt when a defendant was of a lower economic status. Furthermore, the study went on to conclude that the inference of guilt influenced judicial decision making throughout the trial. When the judge believes a defendant to be guilty, he or she is more likely to provide a less favorable courtroom climate for that defendant, be less supportive of defense counsel, assist the prosecution with objections, and discourage output from the defendant.
influence the decision-making process of jurors. [FN119]

*211 As noted above, defense counsel's court-appointed status is usually unknown to jurors. [FN120] However, this does not suggest that individuals who cannot afford private counsel do not suffer repercussions. [FN121] One commentator, examining the quality of state-assisted representation, maintains that stress on any one point of the criminal justice system will have repercussions in other areas. [FN122] Some maintain that the system designed to protect indigents is breaking down. [FN123] For instance, overburdened public defenders typically did not have sufficient time to litigate pre-trial motions, as do privately retained counsel. [FN124] Thus, when an “overworked prosecutor, faced with two otherwise identical cases - one with lots of potentially time consuming motions and one with fewer such motions - and the time to try only one of them, [he] will plea bargain the one with more motions.” [FN125] The same commentator went on to conclude that “private counsel thus tend to enjoy more favorable plea bargains than their public defender counterparts.” [FN126] In a system that has a national plea-bargaining rate of 95%, this difference in treatment could be devastating to indigent defendants.” [FN127]

In another study, the authors examined sentences meted out to those who were represented by private counsel as compared to public defenders and concluded that public defenders are more likely to *212 achieve poorer sentence outcomes. [FN128] The problem had nothing to do with the actual competency of public defenders, but simply with their lack of resources. [FN129] And, as the results demonstrate, as long as the system continues to heavily tax the resources of public defenders, there is no hope that the statistics for the indigent or lower socio-economic class citizen will improve. [FN130]

Significantly, the aforementioned studies were not specific to capital cases. [FN131] Given that in most jurisdictions publicly financed lawyers are generally afforded greater resources for capital representation, the disparity in these select cases may well be minimized. [FN132] However, because of the lack of study in this select area, any further conclusions would reek of speculation.

D. Guilt Phase Contamination as a Barrier

By the very nature of a death penalty trial, jurors are confronted at the guilt phase with the most severe facts: facts focused on murder and so often accompanied by additional vicious conduct, all undertaken by the defendant. Surveys of capital jurors suggest that sentencing decisions are frequently made during the guilt phase of the trial and foreclose juror impartiality during the sentencing phase. [FN133] Such foreclosed impartiality is not simply the result of the grisly evidence produced during the guilt phase, but may have other roots as well, *213 including voir dire, juror predisposition toward or against capital punishment, and jury deliberations during the guilt phase. [FN134]

Very early in the trial process, jurors become alerted to the fact that they may be involved in a death penalty decision. Any emphasis by the prosecution or defense during voir dire questioning on the jurors' capital punishment beliefs may become fixed in the jurors' minds during trial. [FN135] It is difficult to expect that a juror will vote for guilt in a capital murder trial without considering that he or she may be asked to vote for or against a penalty of death shortly thereafter. Of course, consistent with common sense, some jurors make their life-or-death decision because of preconceived notions concerning the appropriateness of the death penalty. [FN136] Many jurors may believe that some crimes are so monstrous that death is the only viable option once guilt is found. For example, some capital jurors express the view that death is required where the offender is guilty of multiple murders, or of killing a police officer, or even rape without murder. [FN137] The sentencing decision for these jurors is effectively over once they are presented with enough facts to convince them of the defendant's guilt. [FN138] Consequently, their capacity to consider mitigation evidence during the sentencing portion of trial is compromised. [FN139]
Finally, jury deliberations during the guilt phase may foreclose impartiality. Jurors may be unable to ignore the temptation to discuss sentencing during guilt deliberations. Undoubtedly, punishment is on the minds of jurors during the guilt deliberation because they know that sentencing closely follows a finding of guilt. Furthermore, some individual jurors may overcome holdout jurors' reluctance to make a guilty determination by agreeing to impose a life sentence rather than the death penalty.

The reality of the various barriers to juror receptivity to mitigation evidence is undeniable. That is the landscape of death penalty trials. With full recognition of that reality the balance of this exercise will focus on the findings of the study undertaken by co-author Brewer which explored whether the manner in which the defense attorney and defendant interact in the presence of the jury will have some effect on the life or death decision-making process of individual capital jurors, and conclude with an examination of the methodologies combating the barriers.

IV. THE STUDY

The hypothesis of the study was that the more jurors perceive a close and warm relationship between the attorney and client, the more willing and able they will be to consider evidence which tends to make a death sentence seem less appropriate.

The data used in the study were compiled by the Capital Jury Project (CJP) which is a consortium of legal and social science scholars. The data was obtained through lengthy in-person interviews of persons who have served as jurors in a capital trial, wherein the defendant was convicted of a capital crime and then followed by a penalty or sentencing phase trial which concluded with a verdict.

A. Variables Included in the Study

The variable to be explained or, dependant variable, was a measure of the jurors' receptivity to mitigation evidence presented during the penalty phase of the trial. The more importance a juror reported placing on mitigating evidence during the penalty phase deliberations, the higher score that juror received on the receptivity variable. Scores ranged from a high of three for jurors who found all mitigation evidence extremely important in their deliberations to zero for jurors who reported all mitigation evidence as not at all important. The mean receptivity score for all respondents in the sample was 1.52.

The primary explanatory variable in the study was the jurors' perceptions of the attorney client relationship. This concept was measured using two items from the CJP instrument. The first item measured the level of interaction between the attorney and client. Respondents were asked, “How did the defense attorney treat the defendant?” They were then provided with the following prompts: acted like the defendant was not even there; occasionally spoke to the defendant, but mostly ignored him; frequently spoke to the defendant, but did not seem to involve him in their decisions; and, seemed to have a close working relationship with the defendant as part of the defense team. The second item asked, “How much would you agree with the following statement: the defense attorney was warm and friendly toward the defendant.” Respondents were then prompted to respond with typical Likert prompts: not at all, not so well, fairly well, and very well.

Several additional variables were added into the model to serve as statistical controls. These controls served to eliminate potentially confounding influences from the model. For example, the relationship hypothesized to exist between the respondents' perception of the attorney-client relationship and their ability and/or willingness to consider evidence in mitigation, may actually be driven by the respondents' perception of the defendant. The juror may disregard mitigation evidence, not because of anything they see the attorney doing, but simply because they...
have very strong feelings about the defendant. Certain statistical techniques “controlled” or held constant the effect of these confounding influences. Ten such control variables were included in this model and are discussed briefly below.

As discussed, a juror's view of the defendant would certainly have some impact on their receptivity to mitigation evidence apart from the attorney-client relationship. CJP respondents were presented with a series of seventeen characterizations of the defendant and asked to rate their agreement with each. These characterizations contained statements such as: the defendant is a “loner” without many friends, does not know his place in society, lacks basic human instincts, was raised in a warm loving home, is someone who loves family, and is a good person who got off on the wrong foot. Responses to these characterizations were combined into a set of four individual variables measuring the respondent's views of the defendant's social alienation, presence of emotional/mental issues, background, and basic human worth. [FN154][FN154]

A measure of the respondent's view of the defense attorney was added to the model in order to allow control for the possibility that the effect of the attorney-client relationship had more to do with the juror's view of the defense attorney individually than how the defense attorney interacted with the defendant. This variable was comprised of two survey items relating to the quality of the defense attorney's advocacy, professionalism and overall impression on the respondent.

In an attempt to control for the impact of regional attitudes on the dependent variables in the model, a variable indicating whether the trial was held in a southern jurisdiction was included in the models. The rationale behind choosing southern as the included category stemmed from the long-standing tradition of support for capital punishment and racial bias which have traditionally been associated with states in the southern part of the country. [FN155][FN155] The gender of the respondent was also included as a term in the model. [FN156][FN156]

Additionally, the potential influence of race was controlled when estimating the model. [FN157][FN157] Previous research indicated a unique race effect for black jurors in cases with a black defendant and white victim. [FN158][FN158] Given the strength of this relationship, only the three-way race variable (a dichotomous variable coded as 1 in black juror/black defendant/white victim cases) was included in this model.

A measure of the respondent's premature sentencing decision (or lack thereof) was also included in the model. [FN159][FN159] The premature sentencing decision measure related to the substance of the respondent's sentencing decision at the conclusion of the guilt-phase of trial. The timing of the respondent's sentencing decision can be roughly determined by an item in the CJP survey instrument. The question asked: “After the jury found the defendant guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think the defendant should be given...” Respondents were prompted for the following answers: “a death sentence, a life (or alternative) sentence or undecided.” [FN160][FN160]

Finally, a respondent's criminal justice attitudes may be a confounding influence in the theoretical model. [FN161][FN161] A person who holds traditionally conservative attitudes regarding the criminal justice system, and punishment generally, may be more or less receptive to mitigation evidence irrespective of how that person perceives the attorney-client relationship. [FN162][FN162] Similarly, this perception of the attorney-client relationship may be influenced by these same criminal justice attitudes. [FN163][FN163] As a proxy, the model included an indicator of the respondents' attitudes regarding the propriety of mercy in criminal cases. [FN164][FN164]

B. Analytical Procedure

As stated above, the dependent variable in this model was measured ordinally. [FN165][FN165] This coding presented special considerations for choosing a statistical model to describe the relationship. [FN166][FN166] The
commonly used estimation method of Ordinary Least Squares regression (sometimes colloquially known as “multiple regression”) was not appropriate for these data. [FN167] Therefore, this model was estimated using ordered logit regression. [FN168] Another consideration centered on the difficulty in interpreting non-linear models. In ordered logic, the coefficients associated with the independent variables are expressed in terms of log odds increases or decreases in the dependent variable. This metric is not readily interpretable in any meaningful way. However, given currently available statistical software capable of converting the slope coefficients into more intuitive metrics, this consideration was largely abated. [FN169] The model's results were expressed in terms of percent change in odds relating to the dependent variable. The metric was the percent change in the odds of a higher outcome versus a lower outcome in the dependent variable (e.g., the odds of being more receptive to mitigation evidence as opposed to less receptive). Table X presents the logit coefficients converted to the percent change metric.

*220 Table X: Percent Change in the Odds of Viewing the Defendant as More Human Opposed to Less Human [FN170]

<table>
<thead>
<tr>
<th>Primary Explanatory Variables</th>
<th>% Change for 1 Unit Increase</th>
<th>% Change for 1 S.D. Increase</th>
<th>......</th>
<th>S.D. of x</th>
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<tr>
<td>Perceived Attorney-Client Relationship (High Level of Interaction: CLOSE)</td>
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<td>-13.5</td>
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<td>.50</td>
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<td>Perceived Attorney-Client Relationship (Warm and Friendly: WARM)</td>
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<td>29.0</td>
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<td>.50</td>
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<td>26.4</td>
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<td>3.84</td>
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<td>24.5</td>
<td></td>
<td>2.26</td>
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<td>Poor Background</td>
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<td>40.0</td>
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<td>2.98</td>
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<tr>
<td>Control Variables Agrees with the Propriety</td>
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<td>29.4</td>
<td></td>
<td>.50</td>
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of Mercy

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<tbody>
<tr>
<td>Black Juror/Black Defendant/White Victim</td>
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<td>.17</td>
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<td>Premature Sentencing Decision for Death</td>
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<td>-29.4</td>
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<td>.46</td>
</tr>
</tbody>
</table>

Note: Only relationships found statistically significant at the .1 level or greater are included in this table.

C. Results

Professor Brewer summarized the results of the study as follows:

Most significantly, this model supported the proposition that a capital juror's perception of the attorney-client relationship is related to that juror's ability and/or willingness to consider evidence presented by the defense in mitigation. As the theory predicts, the more affectively warm the attorney-client relationship was perceived to be, the more likely the juror was to consider mitigation evidence. For respondents who perceived the attorney-client relationship to be warm, the odds of being more receptive to mitigation evidence increased by 66.3 percent. Contrary to initial expectations[,] respondents who felt that the attorney and client worked closely together as part of a team were less receptive. The odds of a respondent who agreed with that characterization of the attorney-client relationship being more receptive to mitigation decreased by 25.3 percent. [FN171] Three indices relating to the respondent's perception of the client were found to have significant effects on receptivity. The odds of being more receptive to mitigation increased (26.4% per standard deviation) as respondents viewed the defendant as having more human qualities. Respondents who perceived the defendant as having mental health issues and as having come from a poor background were also more likely to be receptive to mitigation (24.5% and 40.0% per standard deviation increase in the independent variable respectively).

Three control variables were estimated to effect receptivity to mitigation. [FN172] The odds that a juror who agreed with the idea that even the worst killers deserve mercy would be more receptive to mitigation increased by 67.0%. [FN173] A juror's premature sentencing decision negatively influenced receptivity. [FN174] Jurors who reportedly settled on a death sentence prematurely were 53% less likely to show increased receptivity to mitigation. [FN175]

The final factor was race. The odds of black jurors in cases where a black defendant is charged with murdering a white being more receptive to mitigation were estimated to increase by 147.0%. [FN176] This final conclusion should be taken with some degree of caution as there are only 21 such cases in the model.

V. CULTIVATING “WARMTH”

Given the study's conclusion that jurors who view a capital defendant with some measure of “warmth” are more
likely to listen to and retain mitigation evidence, how then does this “warming” occur? How is the “warm” attorney-client relationship to be fostered? Are there measures beyond the attorney-client relationship that can facilitate this “warmth?” How can capital jurors be prepared to consider mitigation evidence? Generating such warmth is no mean feat. Overcoming the significant barriers confronting capital jurors and cultivating some measure of warmth is as difficult a task as any litigator can face. \[FN177]\[FN177] Efforts to overcome racial concerns, socio-economic biases, *222* regional biases, as well as the shock of revulsion when confronted with guilt phase evidence can be, and typically are, overwhelming. \[FN178]\[FN178] To suggest that there is some infallible remedy available to defense counsel is foolhardy. What is clear, however, is that instead of struggling to overcome prejudices already in place at the sentencing phase, counsel must recognize the necessity of meeting and overcoming the barriers throughout the trial and not simply stepping up to the task at sentencing. \[FN179]\[FN179] Beating back the barriers and “warming” the jurors to the accused is an effort that must be initiated even prior to voir dire and culminate in the defense summation at the sentencing phase. \[FN180]\[FN180]

A. Preparing Jurors to Receive the Message

The study makes clear that even though the emphasis by counsel is invariably on the gathering and presentation of mitigation evidence, the mere presentation of such evidence does not necessarily translate into juror consideration of that evidence. \[FN181]\[FN181] There are a host of factors that affect jurors’ receptivity to mitigation evidence. \[FN182]\[FN182] Jurors should be carefully cultivated in order to maximize the effectiveness of mitigation evidence. For despite even the most compelling content, the message of mitigation will wither if the jurors are not properly prepared to receive it. If the proper groundwork has been laid, however, the message will blossom into full receipt and consideration.

1. Discuss Retention Barriers with the Jurors

Preparation is facilitated by counsel's frank disclosure of the barriers to overcome. Essential to building attorney credibility and overcoming barriers to juror consideration of mitigation evidence is *223 disclosure of those very barriers. \[FN183]\[FN183] Discussing difficulties confronting the defense not only enhances attorney credibility, \[FN184]\[FN184] but such disclosure initiates the process of mitigating the barriers. The barriers, recognized as an article of faith for those enmeshed in capital litigation defense, are largely unrecognized by the jurors, who are but transitory participants in the system. Even those jurors who recognize the general nature of the barriers have probably not had their view of the barriers subjected to the kind of close scrutiny that may be required in a capital case. One way to help in overcoming alienating barriers is to introduce those very concerns into the dialogue of the trial and subject them to scrutiny. \[FN185]\[FN185] Confronting jurors with the barriers they will encounter gives them an opportunity to view their own beliefs and attitudes and puts them in a better position to recognize their limitations so they might overcome them or at least bring them into the open in order that intelligent preemptory challenges can be made. \[FN186]\[FN186] No one, for instance, wants to discuss race and racial attitudes, but when the defendant is African-American and the bulk of the jurors are white, race is an issue and must be confronted.

*224 The first and best opportunity for inviting such a dialogue into the process is during voir dire. \[FN187]\[FN187] Not only can a meaningful and helpful “conversation” between defense counsel and prospective jurors take place but, as suggested earlier, those prospective jurors who are unwilling or unable to recognize the barriers can be identified and excluded. \[FN188]\[FN188] Introducing such a conversation requires tact and planning, the mere suggestion that prospective jurors may labor under racial stereotypes runs the very real risk of alienating them. \[FN189]\[FN189] To broach such a delicate topic without offending or alienating is advocacy at its finest. In probing a prospective white juror on her racial attitudes counsel might undertake the following approach:

Counsel: [speaking to entire panel of prospective jurors.] Now that we've gotten to know each another a bit, we need to discuss a thorny issue, race. Since Mr. Elrod as you can all see is African-American and all the rest of us are Caucasian, I wouldn't be doing my job if I didn't bring up the question of race. Now I have
no reason to believe that any of you have any racial biases but I do know from my own life that past experiences effect us and influence us in ways that we *225 sometimes don't even realize. One incident that has always stayed with me occurred when I was just a kid. I grew up in the suburbs of Chicago. Our neighborhood was almost entirely white but at school there were a few black kids, including Alvin. I very clearly remember when I was either in the 4th or 5th grade coming home with Alvin. We grabbed a snack and then ran down to the park to play basketball. Later that evening after dinner my Dad pulled me aside and told me that it wasn't a good idea to bring my friend around. I was puzzled and asked why. My Dad, who grew up in Tennessee, explained that my friend wasn't like us and that he should be with his own kind.

Now my dad is a great guy and I love him dearly and when I think back on that incident I realize that he was a product of his upbringing and that shaped how he felt about people of different races. That was an event that affected me, its part of me. And while I don't believe I harbor any of my Dad's ill-conceived biases can I be completely certain of that? To some extent aren't we all creatures of our life experiences?

How about you folks? Have any of you had an experience like I had? An experience that even in a subtle way might affect how we feel about people of another race?

[A prospective juror raises his hand.]

Counsel: Thank you Mr. Smith, tell us about your experience.

Prospective Juror Smith: . . .

It is vital to recognize that most people are understandably reluctant to own up to a belief or experience that might put them in an unflattering or uncomfortable light. [FN190][FN190] The challenge then is to get prospective jurors to open up and discuss that which is typically buried in the distant recesses of their life experiences. [FN191][FN191] This above-mentioned technique of counsel's self-disclosure can help provide a bridge for otherwise reluctant prospective jurors. [FN192][FN192] Prospective jurors and counsel can begin a dialogue that will either lead to their dismissal *226 from serving as a juror or force them to confront their own past experiences, recognize them for what they are, and perhaps view the accused in a fresh light. [FN193][FN193]

After the dialogue, if counsel, in conference with his client, continues to harbor concerns about particular jurors - those jurors can be dismissed. [FN194][FN194] This, of course, is the obvious short term benefit of initiating the dialogue. [FN195][FN195] However, the long term benefit when jurors acknowledge potential barriers and offer their assurances to the defense can be immense.

2. Cultivate a Positive Attorney-Client Relationship

As evidenced in the study, the foundation for adequate preparation of the soil is a positive or “warm” attorney-client relationship. [FN196][FN196] The reticence of capital jurors to focus, let alone retain and act upon the defense's mitigation evidence, is best challenged by generating a positive in-court perception of the defendant by the jurors. [FN197][FN197] And in capital cases the defendant's only significant interaction within the view of the jurors is with his lawyer - that interaction therefore becomes the barometer for evaluating the defendant. [FN198][FN198] The perceptions born of that interaction may well facilitate or doom to failure all other efforts undertaken by counsel. [FN199][FN199] As suggested by the study, capital jurors form those critical perceptions of the defendant's character from observing the defendant, his defense counsel, and their interaction. [FN200][FN200]

The genesis of any positive perceptions of the accused spawned from the perceived attorney-client relationship begins with an actual *227 positive relationship between client and lawyer. [FN201][FN201] This is not to suggest
that client and lawyer be best friends, but rather that each understands their roles in the ongoing partnership of a
death penalty trial. [FN202][FN202] Counsel must appreciate his client's angst at his perilous circumstances and the
client must appreciate the complex and pressure laden role of capital defense counsel. [FN203][FN203]

If suggesting such an idealized relationship seems a quixotic ideal, we disagree. While not every attorney-client
relationship will attain this ideal there must be compatibility between lawyer and client and, at least, generalized
agreement as to the conduct of the defense case. [FN204][FN204] Central to this positive relationship is a free and
open dialogue between client and counsel. [FN205][FN205] The root of most problems originating in the attorney-
client relationship is the client's concern that his lawyer is not communicating with him. [FN206][FN206] Strategic
and tactical decisions must be discussed and mutually agreed upon. [FN207][FN207] Building*228 a positive and
mutually supportive relationship requires the lawyer's investment of time. The lawyer must make the time and
exercise the patience necessary to explain to the accused why he believes a particular course of action is correct.
[FN208][FN208] In addition, the lawyer must be open to client suggestions. The give and take of a free range of
ideas in which both ultimately agree is essential. A sound rule of thumb is that neither defendant nor counsel should
ever be surprised by the other's actions at trial. In the event client and counsel find they cannot reach sufficient
accommodation concerning significant matters, serious consideration should be given to terminating the relationship
and new counsel sought. [FN209][FN209]

Defense counsel's consistent display of a positive lawyer-client interaction will facilitate positive perceptions of
the accused. [FN210][FN210] This is perhaps stating the obvious, but though easily stated, it is not a quick or easy
fix. Any perception of client "warmth" must be perceived as genuine not staged, from the heart not choreographed.
[FN211][FN211] What is it that facilitates this warmth? Is it a casual nod from counsel to accused? Exchanging a
knowing glance during witness testimony? A light touch on the client's shoulder during opening statement as
counsel describes the accused's difficult life circumstances? A hushed conversation at counsel table? As the
suggestions imply, generating the desired perception may be nebulous and incapable of being reduced to some
quantifiable measure. Sparks of warmth cannot be calculated or planned but rather must spring forth from an
environment that would nurture and allow for such moments to occur in the natural flow of events. [FN212][FN212]
As will be discussed, that nurturing environment can be planned, and as is clear from the study it must first be *229
grounded in the positive relationship between the accused and his lawyer.

3. Build and Maintain Credibility

Jurors, as students of the attorney-client interactions, look to the defendant's lawyer to assist them in forming
their perceptions of the defendant. [FN213][FN213] Logically, if the jurors have a favorable impression of the
lawyer and the lawyer appears to have a positive relationship with the defendant, perhaps the defendant is a person
worthy of their consideration, someone other than the frightening doer of evil acts. It follows then that the jurors'
perceptions of the lawyer can significantly influence the jurors' consideration of the defense message during the
sentencing phase. [FN214][FN214] Unquestionably, attorney credibility facilitates juror consideration of the
evidence put forth by that attorney. [FN215][FN215] Aristotle referred to credibility as “ethos,” meaning the
character of the messenger as perceived by the receiver. [FN216][FN216] Aristotle envisioned ethos as being made
up of three parts: “good sense,” “good will,” and “good moral character.” [FN217][FN217] In Aristotle's view, the
messenger's ethos extended beyond the common connotation of credibility to the messenger's judgment (good
sense), his respectfulness and courtesy (good will), and his personal rectitude (moral character). [FN218][FN218]

A messenger engaged in logical and rational reasoning and exercising sound judgment will be perceived as
having this “good sense” of *230 which Aristotle spoke. [FN219][FN219] Likewise, the “good will” of the
messenger is most often evident in the courtesy and respect he offers everyone. [FN220][FN220] This “good will” is
not a function of curry ing favor or of being a sycophant, but rather springs from a genuineness of human spirit.
[FN221][FN221] Aristotle also spoke of “moral character,” that characteristic that lifts a person above petty
partisanship, conflicted interests, or other corrupting influences. [FN222][FN222] A messenger who will seek out
and speak the truth no matter the outcome is imbued with “moral character.” [FN223][FN223]
Credibility is not something that can be taken out of a can and used as the situation demands. It is not a trick or a gimmick, it is a constant to be practiced and employed at all times, not just during trial. Gerry Spence once said, “The first trick of the winning argument is the trick of abandoning trickery.” [FN224] A credible messenger can maintain and increase his “ethos” by keeping his promises, avoiding weak claims, treating his audience with respect and courtesy, and disclosing weaknesses in his case.

Jurors as they sort through the contested facts and issues at trial seek guidance. [FN225] An advocate cloaked in the robe of credibility will be a welcome sanctuary. [FN226] An attorney who promises that certain evidence will be produced, or that a particular burden will be met, and then delivers on that promise, will be believed. [FN227] Such an advocate realizes that promises should not be made lightly and that he must deliver on his promises in order to earn the jurors' trust. [FN228] Everything that came before was but a foundation upon which she built her credibility. [FN229] An attorney who has built a reservoir of good will with the jurors and who appears to have a positive relationship with her client will foster that “warmth” essential to juror consideration of the defense message.

4. Educate the Defendant on Courtroom Demeanor

A trial is not a theatrical production with all aspects of the production choreographed prior to trial. Yet there are aspects of trial that can be managed to facilitate the juror's positive perceptions of the accused. [FN230] Foremost is the strategic planning about the image of the defendant presented to the jurors. [FN231]

A capitaly accused defendant, simply by virtue of the charges, is frequently perceived as dangerous and threatening. [FN232] Given the circumstances, he is not only alien to the jurors but frightening to them as well. This fear is often fueled by additional courtroom security personnel and security measures; unfortunately, these additional measures are not always as well concealed as they should be. [FN233] These considerations must be addressed, and instructing the client on his personal behavior and demeanor when in the presence of the jury is an integral part of such planning. [FN234] How the defendant dresses, interacts with courtroom personnel, listens and is attentive during opening statements and closing arguments, reacts to adverse evidence, and shows appropriate emotions including remorse are all considerations great and small that may factor in with individual jurors as they weigh their life and death decisions. [FN235] Such planning not only serves to develop favorable juror perception of the defendant, it also reduces the risk that the defendant will alienate the jurors with poorly received behavior. [FN236] The defendant's courtroom demeanor is particularly critical should the defendant testify. Although the criminal justice system does not require anything of the capital defendant, jurors expect to hear his side of the story. [FN237] Jurors want to see a remorseful defendant at the guilt phase and not just at the penalty phase. [FN238] Frequently, the only evidence of remorse the jurors will hear is from people other than the defendant. [FN239] Despite juror expectations and the possible benefits that can result when the defendant testifies, there are a number of potential pitfalls. As such, there are several considerations that the capital defense lawyer and his client should bear in mind when deciding whether or not the defendant should testify.

First, defense counsel should consider the strength of the prosecution's case. [FN240] This is perhaps most important if the defendant is asserting a denial or reasonable doubt defense because the defendant will, presumably, testify that “he didn't do it.” [FN241] If the prosecution's evidence is strong then the jury is likely to convict regardless of the defendant's statements, which places defense counsel and the defendant in a precarious position during the sentencing phase. Having already told the jury that “he didn't do it” - a claim that the jury obviously didn't believe - the defendant now has to convince the jury that his life, despite his lies, is worth sparing. On the other hand, if the prosecution's evidence is fairly weak, the benefits of the defendant taking the stand probably outweigh the risks. [FN242]
Another significant consideration in the decision whether to testify is the defendant's vulnerability on cross-examination. [FN243] A defendant with prior admissible convictions is an unlikely candidate for the witness stand. [FN244]

Third, when deciding whether the defendant should testify counsel must take into account the type of defense being asserted - denial, reasonable doubt or an affirmative defense. These defenses and their possible consequences are discussed in more detail when discussing strategy. [FN245] but they also bear comment here. If the defendant takes the stand to say that he did not commit the crime and/or that he has an alibi for the time in question he takes the risk that the jurors will reject that claim. As noted above this can be devastating to the defendant's credibility should the jury convict. But, if the defendant testifies while asserting an affirmative defense this risk is less pronounced. [FN246]

Defense counsel must also consider the defendant's level of remorse for the crimes. [FN247] Although jurors want to witness remorse from a capital defendant, [FN248] this remorse must be genuine or else the defendant may be irrevocably damaging his credibility. This consideration must also bear in mind the type of defense being asserted. Obviously defense counsel would be ill advised to assert a reasonable doubt or denial defense while simultaneously having the defendant express remorse for crimes that he testified he did not commit. [FN249]

The final factor that defense counsel should take into account is the defendant's level of sophistication, factoring in his education and other life experiences. [FN249] This factor relates, in part, to the defendant's vulnerability on cross-examination. [FN250] On the other hand, if the capital defendant is educated, sophisticated, and experienced, he may be better able to defend himself from the prosecutor's cross-examination. [FN251]

The defendant's courtroom demeanor regardless of whether he testifies will weigh heavily on the jurors' perceptions of him and will bear directly on the level of their attention and retention of defense mitigation testimony. [FN251] This critical aspect must be thoroughly discussed between counsel and client prior to trial.

5. Personalize, Personalize, Personalize

As suggested throughout this exercise, developing the “personal side” of the accused is a process that does not begin at the sentencing phase but rather commences at jury selection and culminates only at the closing argument during the sentencing phase. [FN252] Client personalization is critically important in every trial but takes on an even greater significance in capital cases where a whole array of biases assault the accused. [FN253] To confront the biases against the accused, the defense must humanize the defendant. The overall aspiration of the defense is to have the jurors become empathetic with the accused. [FN254] *235 Jurors must see a complete picture of the defendant, not just those events surrounding the alleged offense. They must consider life events such as childhood issues, emotional traumas or societal factors that helped shape the accused and which in part may help to explain the dire straits in which he now finds himself. [FN255] While this is a laudable aspirational goal, as discussed earlier, it is a difficult undertaking because the barriers to empathy are significant. [FN256] Barriers such as race, economic status, lifestyle choices and unsavory guilt phase evidence can render the aspirational goal of empathy a fantasy. [FN257] Nonetheless, it is an effort that must be made and a goal that must be accomplished for the jurors to complete their duty and at least consider the mitigation evidence.

At the very first opportunity, typically at the outset of voir dire, counsel should introduce the defendant. [FN258] Counsel may consider standing next to his client and even placing his hand on the client's arm or shoulder as he “personalizes” him. [FN259] This physical contact sends important messages to the perspective jurors about the accused and the relationship between the accused and his lawyer. [FN260] It tells the jury that the client is flesh-and-blood, accessible, and perhaps even non-threatening; it tells the jury that the lawyer has a positive relationship with the defendant, the he believes in the client's case and, more importantly,
believes in his client. [FN261]

The opportunity to introduce and personalize the defendant during voir dire may well be limited by courtroom protocol and custom. [FN262] Nonetheless, counsel should push for every opportunity to personalize her client. Even if efforts to personalize the defendant during voir dire are impeded, defense counsel still has the opening statement where there are virtually no limitations to personalization. The opening statement is a significant opportunity for counsel to send the message that this person, who is accused of capital murder and all the vile acts just described in the prosecutor's opening statement, is still a flesh-and-blood human being. [FN263] The focus here is not on the facts of the case but on the personal life of the accused - his family, his job, his interests. [FN264] This is an opportunity for counsel to make connections between the accused and the jurors and to paint the accused as someone who is not an “other.” [FN265] The personal aspect of defense counsel's opening statement may follow along these lines.

    Ladies and gentlemen let me introduce you to Bill Frost.
    [counsel walks to defense table and stands at Frost's side touching his shoulder.]

    Mr. Frost has lived a difficult life and it is surely difficult circumstances that cause him to be here today. But it hasn't always been like this for him. He grew up here in the San Fernando Valley in a typical suburban home. He has an older sister who is here in this courtroom.

    [points to a woman in the gallery.]

    Her name is Stacy Willem, she is married and has two kids of her own. Mr. Frost's parents can't be here today - his mother died two years ago and his father is confined to a convalescent hospital. Bill married when he was nineteen - awfully young - and not surprisingly it didn't work out, but he was blessed with a son he adores. Max is in the sixth grade and every other weekend he and his dad make up for time they don't have together.

    Bill pitches batting practice to Max until his arm feels ready to fall off. They boogie board together at Zuma Beach and almost every Saturday night they have together Mr. Frost sits through another teenage boy movie with Max. They usually finish off the evening with ice cream from 31 Flavors. Max is the best part of Mr. Frost's life. Max wanted to be here in this courtroom with his dad but Mr. Frost knows that wouldn't be right. He told Max he will call him every night while all of us are in this trial.

    Putting a human face on a defendant, especially a capital defendant, begins the process of warming the accused to the jurors. As significant as that is, of equal importance is that in the process, the lawyer, standing with his client and even touching his client, is communicating to the jurors that he has a relationship with his client, that he is comfortable with him. [FN266] Though the trial is just at the outset of the guilt phase, a long way removed from what may well be the sentencing phase, the process of shaping the jurors' perception of the accused is underway.

    Also important in the personalization process is the language advocates use in referring to their clients. [FN267] The accused should always be referred to by name, never as “my client” and certainly never as “the defendant.” [FN268] However, the advocate should rarely use his client's first name. [FN269] Some judges completely prohibit such a practice but even in courtrooms that do not, frequent use of the first name may suggest too much familiarity between the advocate and the client. [FN270] While the advocate is striving for “warmth” he must avoid the perception that he is attempting to manipulate the jury by placing the defendant on such familiar footing. [FN271]

6. Prick Boils and Mitigate Harmful Facts
Another critical aspect of “warming” capital jurors to the accused is to mitigate the chilling impact of adverse evidence that casts the accused in the worst possible light. [FN272][FN272] Every case that goes to trial has some adverse facts. [FN273][FN273] This is an undeniable reality. And in a capital case there will be an abundance of adverse evidence. Meeting and *238 overcoming such potentially damaging evidence is the measure of truly effective advocacy. Although it may seem counter-intuitive to willingly introduce testimony on facts harmful to one's own case, it is an essential concession that every successful trial lawyer must make. [FN274][FN274] Whether the negative facts go to a prior bad act, a previous conviction, compromised sensory abilities, or even a witness's distressed state of mind, those facts must be disclosed and mitigated. [FN275][FN275]

This notion of meeting and overcoming damaging or adverse circumstances certainly did not originate in trial advocacy, nor is it unique to that endeavor. [FN276][FN276] The concept of addressing and overcoming the negative can be traced from the medical sciences, most notably Jonas Salk's first polio vaccine, a vaccine that inoculated people from a disease that until 1955 had killed up to a half million Americans annually, mostly children, and paralyzed and marked many more for life. [FN277][FN277]

The parallels of the polio vaccine campaign of the 1950s to inoculation in communication theory are striking. In each instance there existed anxiety associated with introducing the very thing feared. In medical science it is the injection of a live-virus; in persuasive speech it is the adverse fact. In both instances the introduction is counter-intuitive; what we instinctually want to do is create as much distance as possible from the perceived negative. Yet inoculation theory has us embrace the negative, which in turn mitigates against its harmful effects. [FN278][FN278]

Logically this effect makes sense. A vaccine infects an individual with a weak dose of the virus which the body's immune system fights to resist. [FN279][FN279] The ensuing struggle strengthens the body's immune system*239 so when the virus is encountered again, the immune system will recognize it and successfully defend itself. [FN280][FN280] The inoculation effect in communication theory works the same way. [FN281][FN281] Just as the body has increased resistance to a virus when antibodies build up after exposure to a weakened dose of the virus, message receivers (jurors) have increased resistance to attitudinal change when defenses and counter arguments have built up after exposure to a weakened argument. [FN282][FN282] Inoculation in persuasion occurs by injecting the receiver with a mild version of the “bad facts” and then successfully refuting those “bad facts.” [FN283][FN283] This counter to the “mild dose” of adverse facts prepares the receiver to weather the forthcoming attack from the opposing messenger. [FN284][FN284] As a result of this now strengthened attitude, the receiver*240 is better able to successfully resist the opponent's anticipated attack. [FN285][FN285]

There are three phases to inoculation. [FN286][FN286] The first is to warn the jurors of an impending attack. [FN287][FN287] In the second phase the jurors' existing defenses are activated in preparation for an attack, which ultimately triggers the third phase, a strengthening of their existing attitudes and bolstered resistance to future attack. [FN288][FN288] The threat motivates the jurors to recognize the vulnerability of their attitudes to possible challenges and stimulates an internal thought process. [FN289][FN289] For instance, during a defense opening statement, counsel confronted with the certainty that his client will be impeached with a prior conviction may proceed along this line:

Mr. Jefferies [the defendant] is going to take the witness stand in his own defense. He fully realizes that he has the absolute right to remain silent but he wants to talk to you and explain who he is and why he is not guilty of any crime. He is going to admit that he has made some mistakes. He is going to come clean and lay it all out for you. John had a run in with the law five years ago. Now this trial has nothing to do with happened years ago but he realizes it looks bad for him. The prosecutor will try to convince you that because of his earlier problem John Jefferies is just flat-out a bad guy and nothing he says is believable. Well, let me tell you, John is going to take that stand and own up to his past, he is going to tell you that he and a couple of his buddies took a car, drove it around for a while, and then left it in a parking lot. Now that's not something that he is proud of. He was a young and foolish man who did a stupid thing. He paid the consequences,
learned from his mistake and now sits before you a better man. And he hopes you folks won't judge him solely on what happened five years ago.

Note that in the initial warning, the jurors were alerted to the upcoming attack on the defendant's character. The advocate then injected the jurors with a limited dose of the very thing feared - the \textit{*241} virus or the damaging facts. This exposure was in a weakened format, framed in soft, mitigating terms. This process involved advancing a limited version of the hurtful fact [the threat] and then minimizing its impact prior to the opponent's anticipated attack.

This preemptive exposure, of course, must strike an appropriate balance. \texttt{[FN290]} If the exposure is too strong, it will cast doubt or skepticism on, or even overwhelm, the original defense. \texttt{[FN293]} Conversely, if the preemptive exposure is too weak, it will fail to stimulate thought and counterarguments and consequently fail to inoculate. \texttt{[FN294]}

Following the preemptive exposure, the receiver's defensive counterarguments begin to build, strengthening the ability to defend itself against a future attack. \texttt{[FN295]} The threat and preemptive exposure create a mindset that encourages the receiver/juror to actively resist the forthcoming attack. \texttt{[FN296]} For instance, in being forthright about the prior conviction during the opening and then at direct examination asking the defendant to explain why he engaged in such conduct and how he has turned his life around, the attorney is both exposing the jurors to the evidence and presenting them counterarguments. The jurors process the information at the same time they process the counterarguments. In this manner the jurors are more likely to empathize with the defendant and view him more favorably. \texttt{[FN297]}

A fundamental purpose of inoculation is to build resistance to a forthcoming attack. But inoculation can also be a powerful tool for building credibility. \texttt{[FN298]} Indeed this “spin-off benefit” may be of \textit{*242} greater import than the effect of the inoculation itself because credibility is vital to effective persuasive communication. \texttt{[FN299]}

Nothing has a more profound impact on credibility than a messenger's willingness to “voluntarily” disclose harmful information. \texttt{[FN300]} The receiver/juror will perceive a commitment to the truth especially when the truth conflicts with the messenger's self-interest. \texttt{[FN301]} Such a willingness establishes the messenger's strong moral and ethical conscience, as well as his respect for his audience. \texttt{[FN302]} Conversely, failure to disclose known adverse facts is a body blow to credibility. \texttt{[FN303]} Failure to disclose will weaken the receiver's perception of the messenger's good will and good moral character, resulting in a devastating blow to the messenger's credibility. \texttt{[FN304]}

While bolstering his credibility, the inoculating attorney also has the opportunity to shape how the jury will perceive the harmful facts and can frame them in a manner that will deemphasize their negative nature. Again referring back to the faux opening statement, note the language used to defuse the prior conviction, “John is going to take the stand and own up to his past. He is going to tell you about when he was nineteen and running with a rebellious crowd.” “Pricking the boil” suggests to the jury that the damaging evidence is in fact not the big deal the other side would have it be; the idea is that if the attorney is willing to disclose evidence that is damaging to her side, it really can't be that bad. \texttt{[FN305]}

The jurors' first impression of the adverse fact will profoundly affect how they will ultimately come to view that fact. \texttt{[FN306]} The rules of \textit{*243} primacy are not to be underestimated. \texttt{[FN307]} First impressions are powerful, and effective advocacy demands strict attention to first disclosure. \texttt{[FN308]}

That disclosure must adhere to the methodology of inoculation; from the warning, to the preemptive exposure,
leading to resistance to the forthcoming attack. [FN309] One should also remember to put the harmful information in the middle of the opening statement or direct examination. [FN310] Principles of primacy and recency suggest that listeners learn best what they hear first and last. [FN311] That being said, you do not want the jury to remember “best” the harmful fact.

Another technique for downplaying the harmful fact is to allow the witness an opportunity to explain away the harmful fact. For instance, if counsel is going to elicit the fact of a prior conviction, he might ask his client on direct examination the circumstances under which he acted and allow him to show remorse to the jury. Finally, discussing mitigating circumstances following introduction of the harmful fact, such as evidence of rehabilitation, may help cocoon the unfavorable fact from the balance of the witness' testimony. [FN312]

B. Maximize the Message with a Consistent Strategy

Maximizing juror receptivity demands that the “guilt phase strategy be coordinated with the penalty phase strategy and must support the case in mitigation.” [FN313] Consequently, planning and execution during the sentencing phase itself must be carefully worked through. After all, what good is it to properly prepare the soil but then fail to water the crops?

As set forth above, building and maintaining the credibility of both the accused and his lawyer facilitates positive juror perception of the accused which in turn leads to greater receptivity to mitigation evidence during the sentencing phase. [FN314] Consequently, it would be devastating to that positive perception to invoke a strategy at the sentencing phase that conflicts with the defense message presented during the guilt phase or which is contradictory to the guilt phase verdict and findings of the jurors. Thus, the sentencing phase calls for careful strategic planning. [FN315] For instance, if the defendant's claim during the guilt phase involved an alibi defense in which he claimed he was not present, a claim that was rejected when the jury convicted, how should the defense now proceed at the sentencing phase? Any response that subjects the credibility of defense counsel or defendant to question will be a body blow to the defense case at sentencing and a likely recipe for a death sentence. [FN316]

In order to maintain credibility throughout the proceedings, defense counsel must consider the sentencing phase before the guilt phase has even begun. [FN317] As one federal study involving the death penalty has noted, “Lawyers in a death penalty case must prepare for both trials, and must develop an overall strategy that takes the penalty phase into account even in the guilt phase. This means that the way the defense proceeds differs from a non-capital case in important ways beginning with jury selection.” [FN318]

Preparation for the sentencing phase simultaneous with preparation for the guilt phase is necessary in order to develop a consistent, coherent defense theme that will resonate with the jury throughout the case, from jury selection to the punishment phase. In order to accomplish this goal defense counsel must at least conduct a “thorough investigation of both the defendant's life history and the crime.” [FN319] This investigation should, at a minimum, include “investigating the facts of the crime and the defendant's life history, consulting with mental health experts, and developing a relationship of trust with the defendant.” [FN320] Once defense counsel has investigated the crime and the defendant's life he must then “consult with mental health professionals who will use their expertise to evaluate, test, and interpret the factual information about the defendant's life and its relationship to crime.” [FN321]

Maintaining a consistent strategy throughout the guilt and sentencing phases necessitates preparation for both phases before the trial itself has begun. But in many cases the evidence needed at the guilt phase is completely different from that needed at the sentencing phase, however financial restrictions may compel defense counsel to “focus on the guilt phase initially with the hope that a good performance at that stage would obviate the need for a penalty phase.” [FN322]
Another obstacle faced by defense counsel in developing a consistent strategy is the enormous tension that exists between the guilt and sentencing phases. [FN323] As advocates for both a not guilty verdict and life, defense counsel is undeniably restricted in his approach during the guilt phase because defense counsel cannot “frame a defense case for acquittal which will preclude or handicap effective advocacy for life.” [FN324] This requires a delicate balancing act.

The most promising guilt phase defense - for example, alibi - can present the most problematic penalty phase situation if it fails. Having found that the defendant was lying about his alibi at the guilt phase, why should a juror believe, or even care about, his tales of child abuse at the sentencing phase? [FN325] Furthermore, “[a] ‘he didn't do it’ guilt phase defense undermines the defense ‘he's sorry he did it’ at the penalty phase.” [FN326] Thus, it is critical that defense counsel make every effort to unearth and consider the mitigation evidence that may be presented during the sentencing phase when developing a strategy for the guilt phase. [FN327] This can obviously alter the overall strategy. Specifically, mitigation evidence is significantly limited by the type of defense put forth during the guilt phase. When the capital defendant opts to assert a “denial defense,” such as alibi or mistaken identity, this “almost certainly preclude[s] a sentencer's crediting any penalty phase admission of guilt or evidence of extenuating circumstances, remorse, or rehabilitation.” [FN328] Doing so would implicitly tell the jury that the defendant was lying during the guilt phase, an irreversible blow to the credibility of both the defendant and defense counsel. [FN329]

If the defendant does not have a reasonably strong basis on which to mount a denial defense, there is another type of defense that the capital defendant could employ that greatly decreases the risk to credibility: reasonable doubt. If the capital defendant chooses to argue a reasonable doubt defense during the guilt phase he may still be able to “persuade the sentencer at the penalty phase that although defendant exercised his legal rights at the guilt phase, he accepts the verdict and now wishes to go forward and explain the crimes and offer evidence in mitigation.” [FN330] In other words, arguing reasonable doubt is consistent with arguing for life during the sentencing phase. But what if evidence of guilt seems overwhelming? Defense counsel and the defendant still risk appearing disingenuous.

Another option, given appropriate facts, is asserting an “affirmative defense.” [FN331] Arguing insanity or diminished capacity may be most consistent with typical mitigation evidence presented during sentencing*247 because the evidence is likely to be the same in both phases. Of course the availability of such a defense is limited. [FN332] For example, self-defense, another affirmative defense, cannot be employed when counsel is aware that the defendant was not so engaged when he acted. [FN333] Likewise, lack of specific intent cannot be used when the defendant admits that he was not intoxicated or otherwise unable to comprehend what he was doing. [FN334] Therefore, while utilizing an affirmative defense is probably the best option at a capital trial, the availability of such a defense is entirely dependent on the facts revealed during pretrial investigation. [FN335]

So what option is the capital defendant left with if he must argue a denial or reasonable doubt defense? How can such a defendant unsuccessfully argue the defense during the guilt phase yet convince the jurors to spare his life during the sentencing phase? In such situations it appears that defense counsel's best option is to assert the defense while simultaneously combating “distancing mechanisms.” [FN336] These distancing mechanisms, also called “mechanisms of moral disengagement” [FN337] include the following: dehumanizing the defendant; viewing the defendant as deviant, different, and deficient; fearing future violence; minimizing the reality of a death sentence; and authorization. [FN338]

Combating the first two distancing mechanisms involves employing a technique already discussed - personalization. [FN339] By personalizing the defendant the jurors are able to see him as someone other than the person accused of a heinous crime. They are able to understand his background, family, and interests. This understanding combats the dehumanizing mechanism employed by jurors while it also helps the jurors view the
defendant as someone who, in some ways, is like them. Thus, it also combats the tendency to view the defendant as “deviant, defiant and deficient.”

*248* The third distancing mechanism - fearing future violence - is perhaps based, in part, on a misconception of the law. After hearing evidence of the defendant's past violent behavior the jurors want to ensure that their communities are safe from such behavior. As a result, they feel compelled to sentence the defendant to death because they hold the mistaken belief that sentencing a guilty defendant to death is the only way to prevent his future release from prison. [FN340][FN340] Even when given the option of life without the possibility of parole many capital jurors still believe that there is a possibility that the defendant may be released from prison in the future. [FN341][FN341] Therefore, in order to combat this distancing mechanism defense counsel must continually remind the jury that life without the possibility of parole is just that. [FN342][FN342] Moreover, counsel should request that the jury be instructed by the judge on the true meaning of life without the possibility of parole.

Minimizing the reality of a death sentence - the fourth distancing mechanism - can be contested by reminding the jurors of the grave reality of their decision to sentence the defendant to death. Many jurors hold steadfast to the instruction that their “decision [is] only a recommendation” [FN343][FN343] in order to distance themselves from the reality of their decision. One study noted that “a lone holdout was able to sway the other[ ] [jury members] by bringing them face-to-face with the consequences of their decision. . . .” [FN344][FN344] Thus, beginning with voir dire and continuing throughout the entire proceedings, defense counsel has an obligation to put the reality of a death sentence squarely in front of each juror. Further, defense counsel must tell jurors that a sentence of death does not mean that the defendant “sit[s] on death row and get[s] old.” [FN345][FN345]

*249* Another way to combat the jurors' tendency to minimize the reality of a death sentence is to provide evidence of “the value of the person whose life they are being asked to take.” [FN346][FN346] This hearkens back to personalization of the defendant. [FN347][FN347]

The final distancing mechanism employed by jurors in capital cases is authorization, namely, that they have been ordered by the law to sentence the defendant to death. [FN348][FN348] Common sense and history have taught us that we “are more likely to act with punitive decisiveness, unrestrained by compassion, when we feel we have been ordered to do so.” [FN349][FN349] Consequently, defense counsel should instruct the jury that the law does not require a death sentence under any circumstances. Defense counsel must become an educator for the jury so that they do not misunderstand the law and use it as a means to distance themselves from their decision to impose a death sentence.

As one can see, a capital defense attorney faces a formidable task when developing a consistent strategy that maintains credibility throughout the capital proceedings. Yet despite the difficulty of this task, it is essential for any capital defense attorney to consider and develop a strategy before the guilt phase begins. This strategy should be developed with the penalty phase in mind so that, assuming the worst - a guilty verdict - the defense counsel can still make an effective argument for life during the penalty phase without losing credibility in front of the jury.

VI. CONCLUSION

Serving as defense counsel in a capital murder case is a daunting task for even the most seasoned of trial lawyers. Pitted against the Leviathan of the state and confronted with the implicit if not explicit biases of the jurors, the trial is so often set on a course that inexorably leads to a death sentence. [FN350][FN350] The foregoing discussion illustrates the enormous complexities involved in the delicate balancing act that defense counsel must engage in: seeking acquittal while simultaneously preparing for the sentencing phase. [FN351][FN351] Faced with the often stark reality of the meanest of facts generating the optimum in negative juror *250* perception of the accused, it is vital that defense counsel recognize the biases and to the extent possible defuse their impact. [FN352][FN352]
Capital cases like all trials have battles within the war. And as documented throughout this exercise, a crucial, if not the crucial front, in death cases is the jurors’ view of the accused. [FN353][FN353] Is the accused to be perceived as simply the evil doer of evil acts as presented by the prosecutor, or will defense counsel be able to push the jurors through the overwhelming predispositions in order that they may glimpse that there is a real, albeit troubled, individual whose life is in the balance?

As set forth in the Brewer study, the critical gauge jurors use to form their impressions of the accused is his interaction with counsel. [FN354][FN354] If that relationship reveals some “warmth” between the two, then the jurors will at least listen to what the defense presents in mitigation. However, as the study warns, should the attorney-client interaction become too involved it creates the sense that the accused is being manipulative. [FN355][FN355] Defense counsel must thread the needle: generate warmth without the appearance of manipulation. This exercise has offered insights and suggestions of how that “warmth” might be generated or perhaps better stated how to prepare jurors to receive the “right” message. Those insights ranging from a frank discussion of the very barriers encountered, to pricking boils and mitigating harmful facts all centered on cultivating a positive attorney-client relationship from which a positive notion of the defendant might emerge. And from this positive notion, this warmth, the jurors will be truly inclined to listen and act upon the defense mitigation evidence.

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[FN1]. See John M. Buckman III, Structure of Persuasion, Fire Engineering, July 2005, at 12-14 (“Your ability to influence others depends on [their state of mind] at the moment of persuasion.”).

[FN2]. Id.

[FN3]. See William J. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings, 70 Ind. L.J. 1043, 1089-90 (1995) (finding that almost half (49.8%) of the jurors polled were still undecided about whether the defendant should receive a death sentence by the end of the guilt phase and that, of those who had decided on the appropriate sentence, only 64.6% were “absolutely convinced”); see also Major Larry A. Gaydo, A Prosecutorial Guide to Court-Martial Sentencing, 114 Mil. L. Rev. 1, 84 (1986) (stating that the “true challenge is to assure that the accused receives the appropriate punishment for the crime”).


The sentencing phase involves the weighing of aggravating and mitigating factors. It allows for the presentation of any aspect of the life and background of the accused, which may influence the sentencer to impose a sentence less than death, with the ultimate aim being that the jury imposes a sentence based on a ‘reasoned moral response to the defendant's background, character, and crime.’

Id.


socioeconomic status of the accused and the outcome of his trial has been found in several studies.”). Vick also notes a study which determined that the poverty of the defendant influenced death sentencing decisions. Id.


desensitize jurors to the fact that the defendant is capable of possessing basic human qualities such as empathy and kindness and thereby limit the jury's conception of the defendant to the crime itself. The goal is to enmesh actor and act so completely that a juror cannot picture one without the other. Any consideration the juror may entertain regarding the basic qualities of the defendant will be coupled with, and ultimately dominated by, the graphic characterizations of the crime that the prosecution will have meticulously laid out during the presentation of the state's case in the guilt phase.

Id. If the process of dehumanization prevails, “the defense would be significantly disadvantaged in combating moral disengagement because they are precluded until the penalty phase of trial from offering direct evidence in mitigation which would ostensibly stress the defendant's humanity.” Id. However, this opportunity may come too late as a study indicates nearly half of jurors make their sentencing decision before the end of the guilt-phase. See also William J. Bowers, et al., Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White, 53 DePaul L. Rev. 1497, 1518 (2004). Bowers writes:

There is evidence that becoming obsessed with the grotesque character of the killing may have the effect of blunting or blocking jurors' willingness to consider mitigation. Certainly, to the extent that the character of the killing convinced jurors that the punishment should be death even before the penalty stage of the trial, they could be expected to attribute little or no importance to mitigation arguments.

Id.

[FN9] The Supreme Court has made it clear that the purpose of bifurcating capital trials is to evaluate the appropriateness of the death penalty and as such jurors “may not refuse to consider[ ] any constitutionally relevant mitigating evidence.” Buchanan v. Angelone, 522 U.S. 269, 276 (1998). However, as the Court in Buchanan makes clear, the trial court is under no Eighth Amendment obligation to require the jury to consider mitigating evidence, making it “constitutionally permissible” for juries to exercise total discretion in determining how to consider such evidence. Id. at 275-77 (emphasis added).


This view of the good within the defendant is very important mitigation at the penalty trial. The jury has usually just experienced a trial filled with images of the horrible things the defendant has done, images which are resonating in their minds at the start of the penalty trial.

Id.

[FN11] Brewer, supra note 8, at 356. “[A] capital juror's perception of the attorney-client relationship is related to that juror's ability and/or willingness to consider evidence presented by the defense in mitigation.” Id.

[FN12] Id. (“[T]he more affectively warm the attorney-client relationship is perceived to be, the more likely the juror is to consider mitigation evidence.”). Respondents who perceived this “warm” attorney-client relationship were 66.3% more likely to consider mitigation evidence. Id. However, if respondents view the attorney-client relationship as too close and “as part of a team,” they are less receptive to mitigation evidence. Id.
Brewer, supra note 8, at 359. Brewer suggests that a possible explanation for the jurors reaction when the attorney and client have a “close working relationship” is that the “defense's case may lose credibility if it appears to be overly directed by the defendant through the defense attorney.” Brewer labels this phenomenon as the “closeness penalty.”

Brewer, supra note 8, at 359. “The more human qualities the defendant appears to possess in the eyes of the juror, the more receptive that juror is to mitigation.” Id. The author continues, “[T]he more a juror views the attorney-client relationship as warm and friendly, the more receptive that juror is to mitigation.” Id.

Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (“[T]he Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

See generally Furman v. Georgia, 408 U.S. 238 (1972) (overturning death penalty sentences which violated the Eighth and Fourteenth Amendments); see also Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1544 (1998). (“[T]he penalty phase of a capital trial is regulated by two basic constitutional rules: A capital defendant cannot be condemned unless he is ‘death-eligible,’ nor can he be condemned unless he has had the opportunity to present any and all evidence in mitigation, free from state interference.”) Pertinent to this article is the mandate that the criminal defendant be allowed to present mitigation evidence. The Eighth Amendment secures the defendant’s right which allows him to proffer as a basis for a sentence less than death.” Id. at 1546.

Furman, 408 U.S. at 286 (Brennan, J., concurring). “Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction.” Id.

Id. at 287-88; see also id. at 238, 346 (Marshall, J., concurring).

Id. at 346 (Marshall, J., concurring); id. at 306 (Stewart, J., concurring).

Id. at 290 (Brennan, J., concurring).

Furman, 408 U.S. at 346 (Marshall, J., concurring); see also id. at 289 (Brennan, J., concurring); see also id. at 306 (Stewart, J., concurring).


People v. Currie, 104 Cal. Rptr. 2d 430 (Ct. App. 2001) (holding “[t]he Sixth Amendment forbids the exclusion of members of a cognizable class of jurors ...).

Kansas v. Marsh, 126 S. Ct. 2516, 2524-25 (2006). (“[A] State capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime.”)

Eddings, 455 U.S. at 114. The sentencer may not “refuse to consider, as a matter of law, any relevant
mitigating evidence.”


[FN28]. Eddings, 455 U.S. at 112.

[FN29]. Morgan v. Illinois, 504 U.S. 719, 739 (1992). (“Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.”).


[FN31]. Buchanan, 522 U.S. at 276.

[FN32]. See Craig Haney, Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death, 49 Stan. L. Rev. 1447, 1455 (1997) (“Mitigating the punishment by humanizing the defendant is a direct attempt to overcome the dehumanizing aspects of the trial process and the case against the defendant that make lethal violence by the jury more likely.”); see also Haney, supra note 10; Whitman, supra note 10.

[FN33]. Albert Bandura, Mechanisms of Moral Disengagement in Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind, 161, 181 (Walter Reich ed., 1998): To perceive another as human enhances empathetic or vicarious reactions through perceived similarity. The joys and suffering of similar persons are more vicariously arousing than are those of strangers or of individuals who have been divested of human qualities. Once dehumanized, they are no longer viewed as persons with feelings, hopes and concerns, but as subhuman objects. Subhumans are regarded as insensitive to maltreatment and capable of being influenced only by harsh methods.

[FN34]. Bandura, supra note 33, at 180-82.

[FN35]. Id.

[FN36]. Bowers, supra note 3, at 1078. It has been duly noted that capital jurors are not like other jurors. See Garvey, supra note 17, at 1549. In fact, capital jurors are “death qualified.” Id. Potential jurors who are against the death penalty will be dismissed for cause by the state because their views prevent them from completing their duties in accordance with the jury instructions. Id. Moreover, potential jurors with “principled reservations against the death penalty” likewise do not usually serve as capital jurors. Id. at 1550. Significantly, “death-qualified jurors are more prone to convict” and there is reason to believe that “they are more receptive to aggravating circumstances.” Id. These facts make defense counsel's presentation of mitigation evidence an uphill battle.

[FN37]. To empathize with someone else requires that the person stop treating the person as merely an object and to try and understand what it is like for them to experience what they experienced. Derek S. Jefferys, Eliminating All Empathy: Personalism and the “War on Terror,” Logos: A Journal of Catholic Thought and Culture, Summer 2006, at 16-22.

[FN38]. Sympathy contains a moment of love for another person. Id. at 20.
[FN39]. Solidarity is a certain belongingness together. Id.

[FN40]. See Alexis de Tocqueville, Democracy in America 565 (George Lawrence trans., 1969) (“It is therefore to this equality that we must attribute his gentleness.”).


[FN42]. See infra note 64 and accompanying text.

[FN43]. Bandura, supra note 33, at 180-82; see also Brewer, supra note 8, at 343. The prosecution in capital cases attempt to morally disengage jurors from the defendant. Id. Dehumanization is one technique that the prosecution uses to “enmesh actor and act so completely that a juror cannot picture one without the other.” Id. By dehumanizing the defendant, the prosecution hopes that “jurors will be more willing to vote in favor of a death sentence.” Id.


[FN45]. Id.

[FN46]. See Whitman, supra note 10, at 265-66 (“By viewing the defendant as an ‘other,’ a person with whom the jurors have nothing in common and could not imagine interacting with, even to the point of questioning the very humanity of the defendant, jurors are more easily able to justify the killing of another.”).

[FN47]. Susan Brandes, Empathy, Narrative, and Victim Impact Statements, 63 U. Chi. L. Rev. 361, 368 (1996) (noting that the legal process lacks “soft” emotions, such as empathy, but is driven by other passions).

[FN48]. See id.


[FN50]. See Brewer, supra note 8.


[FN52]. Id. See also Brewer, supra note 8.

[FN53]. Jefferys, supra note 37, at 23.


[FN56]. For the purposes of this article we will treat the words “race” and “ethnicity” as synonymous. This is consistent with the Supreme Court's handling of race and ethnicity. See Saint Francis College v. Al-Khazraji, 481
U.S. 604 (1987) (holding that, though Arab petitioner was racially Caucasian, he could nevertheless bring an action for racial discrimination under 42 U.S.C. § 1981 because he was “genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens.”). The Court noted that some scientists have concluded that “race” is more of a “sociopolitical” phenomenon than a biological one. Id.


[FN58]. Robert L. Zangrando, The NAACP Crusade Against Lynching, 1909-1950, at 3 (1980). Dating at least to the Revolution and used initially to punish suspected criminals and Tories, lynching proved a popular mechanism for enforcing local mores; it took hold in settled communities and spread along the nation's expanding southern and western frontiers, as well. Gamblers and alleged murderers, desperadoes and horse thieves, antislavery advocates, blacks suspected of insurrectionary plots, Native Americans, and Spanish-speaking minorities comprised the bulk of its nineteenth-century targets. After 1900, immigrants, political radicals, labor organizers, opponents of the First World War, and kidnappers on occasion suffered the mob's fury.

[FN59]. It was during the American Revolution that “lynch law” first emerged. The term “lynch” is derived from Charles Lynch, a justice of the peace in Chestnut Hill, Virginia who served in the Virginia House of Burgesses in the late 1760's. As a result of the great distances of established courts of law and the risk of travel for patriots in British-occupied areas during the Revolutionary War, Lynch and some of his neighbors established extralegal tribunals as a means of judging suspected Loyalists and horse thieves. Thieves found guilty in Lynch's vigilante court were tied to a walnut tree and flogged. Loyalists were whipped and made to shout “Liberty forever!” in addition to suffering other humiliations. Modern methods of lynching encompass unlawful hangings or otherwise killings of persons by mob action. See Philip Dray, At The Hands Of Persons Unknown: The Lynching Of Black America viii, 21 (Modern Library 2003).

[FN60]. Samuel H. Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, 74 Cornell L. Rev. 655, 707 (1989). “In a society such as ours, where race is an obvious and deeply-rooted source of social differences, race presents the most serious otherness problem.” Id.

[FN61]. See Howard L. Nations, Overcoming Jury Bias, Medical Malpractice: Law and Strategy, Aug. 1992, available at http://www.howardnations.com/overcomingjurybias/OJB.pdf. “The old adage is true, ‘birds of a feather flock together.’ We search for similarity... We are comfortable with people who are like us and uncomfortable with people with whom we have no similarities.” Id.

[FN62]. Pillsbury, supra note 60, at 707. “The most dangerous otherness problem for a heterogeneous society is otherness based on group affiliation.” Id. In the case of McClesky v. Kemp, certain “statistics demonstrated a familiar psychological tendency: that predominantly white decision-makers tend to sympathize more with whites than blacks. Whites recognize other whites as part of the commonality; they regard blacks as other.” Id.

[FN63]. Id.; see also Thomas A. Mauet, Trial Techniques 45 (7th ed. 2007) (“We tend to like, and therefore find credible, people with whom we have a shared set of values and beliefs.”).


The empathetic divide describes jurors' relative inability to perceive capital defendants as enough like themselves to readily feel any of their pains, to appreciate the true nature of the struggles they have faced, or to genuinely understand how and why their lives have taken very different courses from the jurors' own. Id.
[FN65]. Id. Haney argues that “so many African American defendants continue to be sentenced to death in the United States because of the failure to collect and properly analyze this structural mitigation and to present it effectively to sentencing juries, as well as the failure of predominately white jurors to appreciate its significance in assessing moral culpability.” Id.

[FN66]. Id. The death penalty and racism depend upon a form of “psychological secrecy” - the refusal to deal with the painful emotional dilemmas that would be generated, and the moral ambiguities we would be forced to confront, if we looked closely and honestly at what we are doing and why. Instead ... the public is given access to only superficial and schematic details of the lives of capital defendants that facilitate their dehumanization...


[FN67]. See Haney, supra note 64.


[FN69]. In a congressionally mandated summary and review of some twenty-eight studies of the topic, a General Accounting Office report found race-of-victim significantly influenced death sentencing in about four out of five of the studies and that race-of-defendant significantly influenced it in about half of them. U.S. Gen. Accounting Office, Death Penalty Research Indicates Pattern of Racial Discrimination (1990).

[FN70]. Turner v. Murray, 476 U.S. 28, 35 n.7 (1986) (holding that failure to examine a jury for racial prejudice during voir dire in a case involving cross-racial violence creates an impermissible possibility of contamination of the sentencing phase of trial).

[FN71]. Bryan C. Edelman, Racial Prejudice, Juror Empathy, and Sentencing in Death Penalty Cases 52 (2006). Jurors tend to accept information presented at trial that aligns with their perceptions of the defendant and alternatively, reject information that is inconsistent with their view of the defendant. See Thomas A. Mauet, Trial Techniques 43 (7th ed. 2007). Mauet states that most people are deductive thinkers. Id.

That is, they are impulsive, use few basic premises to reach decisions, and then accept, reject, or distort other information to fit their already determined conclusions. People use their preexisting beliefs and attitudes about people and events to filter conflicting information, accepting consistent information and rejecting, distorting, or minimizing inconsistent information.

Id.

[FN72]. Edelman, supra note 71, at 63-69. Victims are evaluated by jury members based on a host of factors. Id. The race of the victim and whether the juror is a member of the same racial group will assist in developing a juror's impression of a victim. Id. These impressions attribute to the weight of a victim's importance and the value that will be assessed to the crime committed against them. Id.

[FN73]. Id. at 69-74. Stereotypes contribute to the defendant attribution process. Id. When a defendant is accused of a crime that a juror feels is typical for a particular group of people, the juror will “attribute” that crime to the defendant because it aligns with their preconceived notions of that member of society. Id. At the end of the process and based on the defendant attributions, the juror places a value on the defendant's life which results in a life or death decision. Id.

[FN74]. Edelman, supra note 71, at 152. “The race-of-victim effects appear to be strongest in the cases where the
evidence is ambiguous in that it does not clearly support a life or death sentence.” Id. at 21.

[FN75]. Id. A juror is less likely to support a death sentence if they give weight to mitigating evidence. Id. at 152.

[FN76]. See id at 145. “[T]he logistic regression suggest that positive empathy ... increased the odds that a juror leaned towards death before deliberations began.” Id.

[FN77]. See id.

[FN78]. Id.

[FN79]. Garvey, supra note 44, at 53. The juror imagines herself as the victim of the defendant's violence. Id.


Empathy with a defendant can move a jury toward leniency; empathy with a victim or a victim's family can move a jury toward harshness. Vicariously identifying with another's feelings, volitions, or ideas is most often accomplished with respect to a person whose experiences, values, and appearance are similar to one's own.

Id.

[FN81]. Edelman, supra note 71, at 42.

[FN82]. See supra note 46 and accompanying text.

[FN83]. Id.

[FN84]. Barry Latzer, The Failure of Comparative Proportionality Review of Capital Cases (With Lessons from New Jersey), 64 Alb. L. Rev. 1161, 1238 n.377 (2001). A Georgia study done for the McClesky v. Kemp case in 1987 indicated that defendants who killed black victims versus white victims received the death penalty one percent and eleven percent of the time, respectively. Id.

[FN85]. Edelman, supra note 71, at 56; see also Latzer, supra note 84, at 1238 n.377 (The Georgia study also showed that when blacks killed whites the death penalty was assessed in twenty-two percent of the cases, but when blacks killed blacks the death penalty was only assessed in eight percent of the cases.).

[FN86]. Edelman, supra note 71, at 56. Mitigation evidence is subjective and interpreted in different ways by different jurors. When the defendant was black, this evidence supported a negative view of the defendant. Thus, the mitigation evidence was integrated to support their preconceived perception of the defendant.

[FN87]. See id.

[FN88]. See Haney, supra note 64; see also Nations, supra note 61 (“As jurors receive information during the course of the trial, such information is tested against their model of the case and is either accepted, thereby enhancing the model, or rejected as being inconsistent with the model.”).


[FN90]. Edelman, supra note 71, at 43; see also Laura G. Dooley, The Dilution Effect: Federalization, Fair Cross-

[FN91]. Edelman, supra note 71, at 43; see also Dooley, supra note 90, at 108; William J. Bowers et al., Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition, 3 U. Pa. J. Const. L. 171, 192 (2001). Bowers notes that the frequency of death sentences also dropped when juries were composed of “three or more black female jurors” but that this was due to the fact that a jury with three or more female black members was likely to have at least one black male member. Bowers et al., Death Sentencing, at 194. For that reason, conclusions about a potential “black female presence effect” were not possible. Id.

[FN92]. Bowers et al., supra note 91, at 193.

[FN93]. Dooley, supra note 90, at 108.

[FN94]. Edelman, supra note 71, at 43.


[FN96]. Garvey, supra note 44, at 46.

[FN97]. Id. at 46-47. The black juror was more likely to have found the defendant likable as a person no matter what the race of victim or defendant, no matter how vicious she thought the crime was, no matter if she thought the evidence proved the defendant would be dangerous in the future, no matter how sorry she thought the defendant was or wasn't, and no matter what punishment she thought was appropriate for convicted murderers. Id.

[FN98]. See id. at 47; see also Bowers et al., supra note 89, at 1503. “[B]lack males were the most likely, and white males the least likely, to see the defendant as remorseful and to identify with the defendant’s situation or that of his family.”

[FN99]. See Jared Chamberlain et al., Celebrities in the Courtroom: Legal Responses, Psychological Theory, and Empirical Research, 8 Vand. J. Ent. & Tech. L. 551, 563 (2006) (noting that defendants in the lower socio-economic classes receive substantially higher sentences than those who are “similarly situated” in the upper socio-economic classes); see also David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 Cornell L. Rev. 1638, 1671 (1998) (finding that defendants whose victims possess more than a ‘minimal’ socio-economic status ‘face, on average, a distinctly higher risk of receiving a death sentence than similarly situated defendants with victims of low’ status).

[FN100]. See generally 75 Am. Jur. 2d Trial § 668 (1991) (noting that reference to the defendant’s socioeconomic status is generally inadmissible at trial as an appeal to passion or prejudice).

[FN101]. See Richard D. Friedman, Still Photographs in the Flow of Time, 7 Yale J.L. & Human. 243, 247 (1995) (referring to victims, the author mentions that we can decipher someone’s socio-economic status by looking at the way they dress).


[FN103]. Id.
[FN104]. See generally People v. Carpenter, 935 P.2d 708, 750 (Cal. 1997) (Some attorney's guard their status as appointed counsel so jealously that even a passing reference to it made by the prosecutor has been grounds for judicial review.).


[FN107]. See Chris Baker, What is Middle Class?, Wash. Times, Nov. 30, 2003 (one way economists separate the American population into classes is by dividing American families into five groups based on income with 20% of families in each category, with the middle three categories designated as “middle class”); see also Kenneth Eells et al., What Is Social Class In America? (1949) (discussing Warner's original five-tiered theory which divided the American middle class into “upper-middle,” “middle-middle,” and “lower middle”).

[FN108]. Paul Fussell, Class: A Guide Through the American Status System, (Summit Books 1983). Fussell himself actually offered a model with a nine-tiered stratification of American society: (1) Top Out-Of-Sight; (2) the Upper Class; (3) the Upper-Middle Class; (4) the Middle Class; (5) the High Prole; (6) the Mid Prole; (7) the Low Prole; (8) the Destitute; and (9) the Bottom Out-Of-Sight.

[FN109]. See Baker, supra note 107 (noting that some Americans are worried about the struggling economy causing them to loose their status as middle class and, statistically speaking, most middle-class families cannot afford a “middle class lifestyle;” one subject of the article even went as far as stating, “I may not be middle class anymore, but I am faking it. I'm going to fake it until I make it.”).

[FN110]. Bright, supra note 106, at 1841-42 (discussing the often abysmal performance of appointed counsel in death penalty cases).

[FN111]. There are some studies that indicate that socioeconomic status alone may influence jury verdicts. Freda Adler, Socioeconomic Factors Influencing Jury Verdicts, 3 N.Y.U. Rev. L. & Soc. Change 1, 8. However, this study found that the socioeconomic bias works both ways, that juries are more likely to convict a defendant of different socioeconomic status regardless of whether it is higher or lower. Id. at 9. These findings suggest that any socioeconomic bias displayed by the jury is really part of the broader otherness problem rather than any specific bias against the poor.

[FN112]. Bright, supra note 106 and accompanying text; infra note 116 and accompanying text.

[FN113]. See Peter Blanck et al., The Appearance of Justice: Judges' Verbal & Nonverbal Behavior in Criminal Jury Trials, 38 Stan. L. Rev. 89 (1985). The study observed 34 actual criminal trials with one defendant each, presided over by a total of five California Municipal Court Judges. The Judges were videotaped giving their final jury instructions to a total of 331 jurors. There were a total of sixty-one attorneys participating in the study; 32 were prosecutors and 29 were defense attorneys. The offenses the defendants were charged with constituted a representative sample of the judges' normal caseload, and had a wide range which included child molestation, vehicular manslaughter, assaulting a police officer, prostitution, drunk driving, and carrying a concealed weapon. Id. See also Peter David Blanck, Calibrating the Scales of Justice: Studying Judges' Behavior in Bench Trials, 68 Ind. L.J. 1119 (expanding upon the earlier study and confirming the findings).
In fact, it has been argued that we would not want our judges to behave as automatons. The Alabama state appellate court writes in Allen v. State:

The trial judge is a human being, not an automaton or a robot. He is not required to be a Great Stone Face which shows no reaction to anything that happens in his courtroom. Testimony that is amusing may draw a smile or a laugh, shocking or distasteful evidence may cause a frown or scowl, without reversible error being committed thereby. We have not, and hopefully never will reach the stage in Alabama at which a stone-cold computer is draped in a black robe, set up behind the bench, and plugged in to begin service as Circuit Judge.


[FN114] Blanck et al., supra note 113, at 121. The study suggests that even if low socio-economic status has no legal bearing on guilt or innocence, it does directly relate to how a judge perceives guilt or innocence.

[FN115] See id. at 139-42. (for a defendant the judge believes to be innocent, the judge may encourage output by allowing that defendant more time to answer questions on direct or cross, or helping to shape questions or responses to the defendant's benefit, or may even go so far as recall the defendant to the stand to testify to matters not covered by defense counsel); see also id. at 90 n.8 (describing other ways in which trial judges can influence the trial process that have been found to be impermissible and which constitute reversible error).

[FN116] Id. at 90. Trial judges may influence the trial process in ways that correspond to their expectations for trial outcome. During the jury trial, the judge may reveal these beliefs or expectations by trying to 'engineer' the trial in accordance with these expectations - for example, in comments on the evidence, in responses to witnesses, or in rulings on objections. Id. Thus, the trial judge's belief of the accused's guilt or innocence sometimes unintentionally manifests itself in the judge's actions. Id.

[FN117] Id. at 135-36. Although the authors of the Stanford study admit there may be some caution due before generalizing their findings to all trials and courts, they believe there is no reason to infer their study is not representative. It can be argued that the widely varying results can be accounted for by changes in the proceduralization of the criminal justice system as well as the amount of public money spent at any given time on the public defender system. See Morris B. Hoffman, Paul H. Rubin, & Joanna M. Shepherd, An Empirical Study of Public Defender Effectiveness: Self-Selection by the “Marginally Indigent”, 3 Ohio St. J. Crim. L. 223, 228 (2005).

[FN118] See supra note 104 and accompanying text.

[FN120] See supra note 104 and accompanying text.

[FN121] See supra, supra note 106.


[FN123] In her study, Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records and Leniency in Bargaining, Dean J. Champion concluded that privately hired counsel enjoy a higher trial rate and have a lower conviction rate than public defenders. Dean J. Champion, Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records and Leniency in Bargaining, 17 J. Crim. Just. 253 (1989). But in a study published by the National Center for State Courts in 1992, it was reported that public defenders plea bargain 95% of their cases and won dismissal in 9% of their cases, and overall have an 88% conviction rate, while privately retained counsel plea bargained 91% of their cases, won dismissal in 13% of their cases, and have an overall conviction rate of also 88%. Roger A. Hanson, Indigent Defenders: Get the Job Done and Done Well (1992). But whichever result is more
reliable, perhaps what should be of more concern is the disparity in sentencing a guilty defendant will receive when represented by a public defender rather then privately retained counsel.

[FN124]. Hoffman et al., supra note 119, at 228.

[FN125]. Id. This study is perhaps one of the more reliable studies on the true effectiveness of public defenders versus that of privately retained attorneys for three reasons. First, this study actually measures sentencing outcome as opposed to minor gauges of success such as the time it took for the attorney to meet his or her client or the time it took to file a deposition. Secondly, unlike other studies that examined this question, this study used regression techniques to control for the seriousness of charges. Finally, this study is more wholistic, taking into account the length of sentences and examining all types of sentences, not just those that involve prison time.

[FN126]. Id.

[FN127]. Id.

[FN128]. Id. at 245-249. The results of the study indicate that the low success rates have less to do with lawyer competency than with the quality of the cases they try. The study points out that a large number of “marginally indigent” individuals, those who could afford private counsel if facing serious charges, but who choose to make use of the public defender system otherwise, are flooding the desks of public defenders with more work made up of cases that have bad facts and provide only a weak case for the defense at best.

[FN129]. Id. at 249 (noting that “[o]n average, public defender clients suffer in excess of three years more incarceration than private defense clients, even controlling for the seriousness of the charge.”). But, it is possible that public defenders just have less defensible cases. Id. at 250. Marginally indigent criminal defendants will be more willing to spend their resources and hire private counsel when the charges are serious and they are innocent. Id.

[FN130]. See Hoffman et al., supra note 119.

[FN131]. Id.; Champion, supra note 123.

[FN132]. Phyllis L. Crocker, Childhood Abuse and Adult Murder, 77 N.C. L. Rev. 1143, 1192 (1999) (noting that court appointed capital defense attorneys should be able to successfully request assistance for a variety of tasks necessary to preparing for the case).

[FN133]. William J. Bowers et al., Symposium: Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Guilt-trial Experience, and Premature Decision Making, 83 Cornell L. Rev. 1476 (1998). Among surveyed capital jurors, almost half had made a decision as to punishment during the guilt phase of trial. Id. at 1488. Three out of ten had already decided that the death penalty should be imposed and two out of ten had already decided that life imprisonment was appropriate before the guilt deliberation. Id.

[FN134]. Id. at 1477, 1523.

[FN135]. Id. at 1524 (quoting a capital juror: “I believe everyone had a good idea that if he was found guilty of first-degree murder then it looked like the death penalty. I think everyone had that in mind because they were very persistent in picking the jury about the death penalty, especially the prosecution.”).

[FN136]. Id. at 1504.
Bowers' study discovered that “more than half of the [surveyed] jurors said that they believed that death was the only acceptable punishment for three of the seven kinds of murder: repeat murder, premeditated murder, and multiple murder.” Id. at 1504. He also found that almost half of jurors would require capital punishment for the killing of a police officer or murder by a drug dealer. Id. His most shocking result, however is that almost a quarter of jurors felt morally required to impose the death penalty on rapists who did not commit a murder. Id. at 1505. He notes that such a penalty is unconstitutional according to the Supreme Court ruling in Coker v. Georgia, 433 U.S. 584, 592 (1977).

Bowers et al., supra note 133, at 1511.

See infra note 175 and accompanying text.

Bowers et al., supra note 133, at 1521.

See id. at 1522 (quoting a capital juror: “We weren't supposed to but we did. I remember a discussion going around, if he is found guilty, will we sentence him to death or not.”).

See id. (quoting a capital juror concerning guilt phase deliberations: “It was a concern of the jury that if we find him guilty, will we have to give him the death penalty or something to that effect.”).

Id. at 1527 (quoting a capital juror: “To sell the two [holdouts], we won't go for death penalty. They said we made an agreement.”). Bowers found that the converse situation also occurred: individual jurors announced at the guilt phase deliberations that they would only vote for life imprisonment and that the other jurors would have to go along with it or risk a “hung jury.” Id.

The results of this study were originally published in: Thomas W. Brewer, The Attorney-Client Relationship in Capital Cases and its Impact on Juror Receptivity to Mitigation Evidence 22 Just. Q. 340 (2005).

Id. at 345.

Id. at 345.


The CJP survey instrument asks respondents to rate the relative importance they personally placed on individual pieces of mitigating evidence during deliberations. They were prompted to respond “not at all,” “not very,” “fairly,” and “very.” Numerical values were assigned to each possible response such that the more weight placed by the juror on the mitigating factor the higher numerical value it received. These values were then averaged for the total number of mitigating factors reported by each respondent creating an overall measure of each juror's receptivity. The resulting variable ranged from 0-3 (mean: .851, st. dev..635) and was not distributed in such a way as would easily facilitate statistical interpretation. Given this lack of Normality, the continuous measure was transformed into a seven category ordinal variable ranging from 0-3 at .5 unit intervals.

The complete CJP dataset contains information on 1,198 jurors. However, not all survey items used in the construction of this model were asked of all respondents. Cases which contained a missing value, for whatever reason, in any variable required for the current study were excluded from the analysis. Also, jurors who did not recall the defense attorney making any of the mitigating arguments contained in the dependent variable were excluded from the study. There were 725 cases remaining in this sample.

44.6% of respondents recalled a close working relationship between the attorney and client. Brewer, supra note 144, at 349.

A Likert scale is a common tool used to assess the strength of a respondent's attitudes or beliefs. A typical Likert prompt will present the respondent with a statement and then prompt the respondent to indicate the strength which he or she agrees or disagrees with the statement. Each response is assigned a numerical value in order to facilitate statistical analysis.

50.3% of respondents agreed “fairly well” or “very well” with that statement.

The seventeen characterizations included in the survey instrument were reduced into the four domains through a process of factor analysis using principle components analysis with Varimax rotation and Kaiser Normalization. This process yielded the four components with an Eigen value of 1.0 or greater. The survey items comprising those factors were coded for consistency (e.g., higher numerical values representing higher agreement with the factor) and summed into scales.


Both the history of capital punishment in this country and many modern studies suggest a strong relationship between race and the administration of the death penalty. See generally David C. Baldus, George Woodworth, Charles A. Pulaski, Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990); Brewer, supra note 144, at 351.


For the attorney-client relationship to have an effect on the jurors' receptiveness to mitigating evidence it must prevent the juror from fixing on a sentence before hearing mitigating evidence. Brewer, supra note 144, at 351.

Id. This measure is treated as a nominal level variable, which represents the theoretical universe of potential premature sentencing outcomes. See id. Responses were coded in three dummy variables as either having made a premature decision in favor of a death sentence, a premature decision in favor of a life sentence, or as being undecided. Id.

Id. at 353.

Id.

Id.
[FN164]. Id. Respondents who agreed with the statement: “even the worst criminals should be considered for mercy,” will be coded as 1 on this measure, and respondents disagreeing or answering “not sure” will be coded as 0.

[FN165]. Brewer, supra note 144, at 353.

[FN166]. Id.


[FN168]. Another consideration concerning the data, results from stratification and clustering in the sampling procedure. The sample was stratified according to the juries’ sentencing decision. The goal was to produce a sample where half of the jurors sampled served on a trial where the ultimate sentence was life and half of the jurors served on a trial where a death sentence was returned. The data were then sampled by state jurisdiction and then trials within those states. This multistage sampling design results in observations within a cluster not being independent of one another. This clustering and stratification will lead to incorrect standard error estimates which in turn affect the reliability of confidence intervals and test statistics. To correct for the complex sampling design, the model is calculated using a specialized survey form of ordered logit regression offered in Stata statistical software. Stata Corporation, Stata Statistical Software: Release 8.0 (2003) (for more information on this software, see http://www.stata.com/stata8). The software allows the user to specify the sampling procedure used in the collection of data which will calculate adjusted standard errors correcting for the effects of stratification and clustering within sampling stages. Stratification in the data were specified by a dichotomous variable identifying the type of sentence. Individual trials were specified as the primary sampling unit (PSU). The variance estimators used in Stata, because they make fewer assumptions, are more robust and will generally be unbiased or biased towards more conservative estimates even in multi-stage sampling designs. Stata Corporation, User's guide: Release 8.0 346-47 (2003) (for more information on this software, see http://www.stata.com/stata8). An underlying assumption of ordered logit model, known as the parallel regression assumption, states that the slope coefficient estimates generated by this series of binary regressions are equal and only the intercept changes. Long, supra note 167, at 140; J. Scott Long & Jeremy Freese, Regression Models for Categorical Dependent Variables Using Stata 150 (2001). This assumption can be tested with an approximate likelihood-ratio test developed by Wolfe and Gould for the Stata statistical software package. Rory Wolfe & William Gould, An Approximate Likelihood-Ratio Test for Ordinal Response Models, 22 Stata Technical Bull., 193 (1998), described in Long & Freese, supra at 151. The null hypothesis of this test is that the slopes of the J-1 binary logits are equal or at least “close” to being equal. Long & Freese, supra at 151. The null hypothesis cannot be rejected and violation of the parallel regression assumption is not indicated.

[FN169]. Brewer, supra note 144, at 355.

[FN170]. Id. at 356.

[FN171]. Id. at 356-57.

[FN172]. Id. at 356.

[FN173]. Id.
[FN174]. Id.

[FN175]. Brewer, supra note 144, at 356.

[FN176]. Id.

[FN177]. See Craig Haney, Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death, 49 Stan. L. Rev. 1447, 1456. Haney argues that public sentiment surrounding the death penalty and capital defendants has been so heavily manipulated and misconceived that the average juror is more prepared to do the state's bidding. Id. at 1449-50. Only by the systematic process of gross dehumanization, which begins even before the trial, can an atmosphere exist where twelve sane men and women sit together and calmly discuss putting their peer to death. Id. at 1447.


[FN179]. See Jill Miller, The Defense Team in Capital Cases, 31 Hofstra L. Rev. 1117, 1121 (2003) (noting that “[t]he goal of saving the client's life must be the top priority for the defense and must be considered in all other decisions made and actions taken by counsel ... [g]uilt phase strategy must be coordinated with penalty phase strategy and must support the case in mitigation”).


[FN181]. Brewer, supra note 144, at 345.

[FN182]. See discussion infra pp. 222-49.

[FN183]. See generally Alexander M. Czopp & Margo J. Monteith, Confronting Prejudice (Literally): Reactions to Confrontations of Racial and Gender Bias, 29 Personality & Soc. Psychol. Bull. 532 (2003). The authors of this article importantly acknowledge an individual's reaction when confronted with their biases. In addition, the United States is currently more racially and ethnically diverse than ever before.


[FN185]. See Samuel R. Sommers & Phoebe C. Ellsworth, White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom, 7 Psychol. Pub. Pol'y & L. 201, 222 (2001) (discussing how introducing racial issues at trial can be a useful tool to “remind ... jurors of their egalitarian values and of the possibility of racial bias in the criminal justice system.”).

[FN186]. See Czopp & Monteith, supra note 183, at 532-33. An examination of historical events “suggests that confrontation can indeed be a powerful medium for social change.” For example, in the 1960s, Civil Rights activists used confrontation “to protest the inequality and hypocrisy of government-sanctioned discrimination” including bus boycotts, protest rallies, and marches. This confrontation effectively resulted in “governmental changes, the abolition of legalized discrimination, and the creation of a social climate with strong norms against overt and hostile expressions of prejudice.” But, it was carefully noted that the prejudice was not fully eliminated and some even
argue that the prejudice “resides ‘underground’ and that more subtle manifestations persist.” The author expresses two main reasons why confrontation is an effective tool for decreasing prejudice. First, confrontation is a “means of emphasizing norms of nonprejudice and egalitarianism. Second, confrontation can increase personal awareness of bias which is often caused by stereotypes. One study suggests that self-confrontation raises awareness, creates feelings of self-dissatisfaction, and likely reduces prejudicial responses in the future. The author thoughtfully inquires whether this chain reaction can also be a product of confrontation by others. The author’s propose that people's reactions to confrontation will depend on two important factors: the group targeted by the prejudiced response and whether the person making the confrontation is a member of that target group.”

[FN187]. See Thomas A. Mauet, Trial Techniques, 1, 38-41 (7th ed. 2007) (commenting that “the jury selection process is an opportunity for a trial lawyer to become the jurors' friend and guide them by helping them understand the trial system ...”); see also L. Timothy Perrin et al., The Art & Science of Trial Advocacy 9, 73 (2003) (stating that voir dire “is an opportunity for the lawyers to begin shaping and developing their cases and to begin building a rapport with the jurors”). Significantly, “[e]mpirical research confirms the astonishing reality that many jurors identify ‘their’ side of the case during voir dire and hold to those perceptions throughout trial.”

[FN188]. See Mauet, supra note 187, at 42 (noting that lawyers who get honest feedback from the jury are those “who create a comfortable environment for disclosure and initiate the disclosure process by revealing” information about themselves). Furthermore, Mauet identifies the primary purpose of jury selection as selecting an open-minded jury who will be “receptive to your proof.” Id. During voir dire, the attorney must learn about the prospective jurors' beliefs and attitudes, so that they may intelligently exclude certain jurors. Id.; see also Perrin et al., supra note 187, at 10. There are two ways in which a lawyer can exclude potential jurors: challenge for cause and preemptory challenge. A lawyer can make an unlimited number of challenges for cause, where a juror is excluded because he or she fails to satisfy the statutory requirements. On the other hand, a lawyer can only make a limited number of preemptory challenges, where a juror is excluded for any reason, usually because the lawyer believes that the particular juror is less likely to be sympathetic to their case. Thus, lawyers can use their limited number of preemptory challenges to exclude prospective jurors who they believe are unable to recognize the barriers discussed throughout this article. See also Black's Law Dictionary 92 (2d pocket ed. 2001) which defines “challenge for cause” as a “challenge supported by a specified reason, such as bias or prejudice, that would disqualify that potential juror” and “preemptory challenge” as one of a “limited number of challenges that need not be supported by any reason, although a party may not use such a challenge in a way that discriminates on the basis of race, ethnicity, or gender.”

[FN189]. Czopp & Monteith, supra note 183, at 537 (2003). In a study, researchers found that after a racial-bias confrontation, 13.6% of reactions were of a hostile nature. Noteworthy, participants in the study differentiate between various biases, indicating that they felt more uncomfortable being confronted about racial basis, rather than gender bias.

[FN190]. Mauet, supra note 187, at 44 “[M]any people are less than candid when asked directly about their beliefs and attitudes, particularly in front of strangers in a group setting.” Id; see also Czopp & Monteith supra note 183, at 539. Importantly, participants in the study who were high-prejudice, as opposed to low-prejudice, reacted by feeling annoyed and irritated, particularly when confronted by a person in the target group, such as a member of the racial class.

[FN191]. Id. at 43-46. Mauet identifies several methods to discover the potential jurors true attitudes and beliefs, including considering the jurors' background, interests, and experiences in life to draw inferences and examining potential jurors' body language. Id.

[FN192]. See id. (“Self-disclosure by the questioner substantially improves self-disclosure by the person being questioned.”). Moreover, once the lawyer creates a relaxed and conversational environment, jurors are likely to overcome their fear of being judged and answer counsel's questions honestly. Id.
[FN193]. See id.

[FN194]. See supra note 187 and accompanying text.

[FN195]. Id.

[FN196]. See discussion supra Part IV.C.

[FN197]. Brewer, supra note 144, at 343 (arguing that when jurors distance themselves from the accused, it makes it easier for them to sentence the defendant to death). Thus, humanizing the defendant and creating a positive perception of the defendant is crucial in the defendant's fight for life. See id.

[FN198]. See generally Elliot W. Stone, Power Positioning in the Courtroom, available at http://www.medquestltd.com/articles/article31.html (“Close proximity between client and attorney creates a perceived bond. Touching and relating to your client sends an important message to...jurors that they, too, can like and accept your client. This is especially recommended if [as in a capital case] the client is distasteful to the potential jurors.”).

[FN199]. See H. Mitchell Caldwell et al., Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination, 76 Notre Dame L. Rev. 423, 473 (2001). Personifying the client gives an opportunity for the jury to have real rapport, leading to credibility and trust. Id.

[FN200]. See generally Brewer, supra note 144.

[FN201]. See Steve Champion, Attorney-Client Relationship: Who Has the Final Say, in The Geography of Death Row: Essays from Inside San Quentin, 4 Proudflesh: A New Afrikan Journal of Culture, Politics & Consciousness 2006, available at http://www.proudfleshjournal.com/issue4/champion.html. For a defendant battling death row, the attorney client relationship is too often a battle of inclusion. Id. “The truth is, the attorney/client relationship has to be one of mutual cooperation in order to present the best and strongest defense possible. But oftentimes the client is treated like a footnote, something acknowledged and referred to every now and then.” Id. Champion urges the attorney to consult with the defendant, who is acutely aware of the jurors' body language and other non-verbal cues. Id. To create and maintain a positive attorney-client relationship, you must focus on respect, cooperation and inclusion, even on “non-issues.” Id.

[FN202]. Champion, supra note 201.

[FN203]. Id. The attorney-client relationship is typically hindered by a struggle for control. Id. All too often, defense attorneys in capital cases assume that their clients are unable to understand the complexity of the legal system and therefore act unilaterally, without the knowledge or consent of the client. Id. This kind of paternal behavior can make the client feel disrespected. Id. The accused and counsel must instead strive to develop a relationship of mutual respect in order to successfully pursue their common goal: keeping the client alive. Id.

[FN204]. See Champion, supra note 201. The client lives everyday with what takes place during the trial and sometimes becomes an expert in his own defense. The author rightly implies that the client must contribute to the administration of his own defense. See also ABA Criminal Justice Section Standards, 4-1.2(b). “The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.”
[FN205]. See Champion supra note 201 (noting that “for many men on death row [,] the relationship they develop with their attorney is the first honest and open relationship they have had with another human being”).

[FN206]. Id. “Much of the mistrust and conflict between attorneys and their clients stems from attorneys making unilateral decisions without their client’s knowledge or prior consent. ... [C]ounsel must respect the rights and wishes of the client to play a significant role in determining their own destiny ...” Id.

[FN207]. Id. See also Model Rules of Prof'l Conduct R. 1.4(a)(2) (2006 ed.). “A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished.” See id. R. 1.4(a)(2) cmt. 3 (stating that this duty requires consultation prior to action).

[FN208]. See Model Rules of Prof'l Conduct R. 1.4(b) (2006 ed.). “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

[FN209]. See Model Rules of Prof'l Conduct R. 1.16(b)(4) (2006 ed.). “... [A] lawyer may withdraw for representing a client if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”

[FN210]. See also Nations, supra note 61 (“The simple rule is that everything that occurs in the courtroom during every moment that a jury is present, can influence the creation, reinforcement or rejection of perceptions and must be consciously considered by counsel as an important part of the trial.”).

[FN211]. See H. Mitchell Caldwell et al., supra note 184, at 980-81. Overwhelming efforts to ingratiate yourself with the jury will be perceived as false without an actual foundation of sincerity. Id.

[FN212]. See id. It can be inferred from the author's promotion of sincerity that the environment for creating that spark of warmth should not be artificially created, but be within the scope of a trial's natural progression.

[FN213]. See supra note 159 and accompanying text.

[FN214]. See also Nations, supra note 61. “Credibility exists solely in the mind of each individual or juror. To each juror credibility means that this is an individual whose message they can trust which results in the juror listening more closely, for a longer period of time and giving more weight to the message presented by the credible person, whether that person is an attorney or a witness.”

[FN215]. See Caldwell, supra note 184, at 974 (noting that the credibility of the advocate is “fundamental to an effective closing argument.”). Furthermore, “[o]nce attorneys earn credibility, jurors will take advocates at their word and will ignore inconsistencies and rationalize weaknesses in the case.” Id.

[FN216]. Richard D. Rieke & Randall K. Stutman, Communication in Legal Advocacy 116 (1990) (“About twenty-five centuries ago Aristotle first described how perceptions of a speaker enhanced persuasion.”); Ronald J. Waicukauski et al., Ethos and the Art of Argument, Litigation, Fall 1999, at 31 (describing ethos as “the character of the advocate as perceived by the listener.”).


[FN218]. See id. (“Although the names have changed, the concept of credibility remains essentially the same. Contemporary researchers continue to dispute the labels, but they generally agree that two main components constitute credibility: trustworthiness (also known as character and safety) and expertise (also known as
authoritiveness, competence, and qualification).”). Id.

[FN219]. See Waicukauski et al., supra note 216, at 33 (stating that “[a] speaker risks serious damage to his ethos if his reasoning is faulty”); Rieke & Stutman, supra note 216, at 118 (noting that “[a] communicator's message is perceived as more persuasive when he or she is more logical, more predictable”).

[FN220]. See Waicukauski et al., supra note 216, at 33-34 (stating that “[i]f the jurors get the impression that you do not respect their intelligence, they will not like you” and noting that to increase ethos an attorney ought to be courteous and civil at all times, even when opposing counsel is not).

[FN221]. See Herbert J. Stern, Trying Cases to Win 29 (1991) (noting that one must at all times be respectful not “in a supine way or to curry favor, but because it is appropriate not because the rules require it but because that’s the respectful way to do it”).

[FN222]. Waicukauski et al., supra note 216, at 31 (noting that Aristotle viewed the integrity of the speaker to be a key component of his ethos).

[FN223]. See id.; see also Thomas A. Mauet, Trial Techniques 19 (6th ed. 2002) (“[T]rustworthiness refers to impartiality. For lawyers, [this] means that the lawyers are candid in dealing with both good and bad fact, and do not try to pull the wool over the jurors' eyes.”).


[FN225]. See Nations, supra note 61 (indicating that jurors search for and appreciate a credible advocate).


[FN227]. Deirdre D. Johnston, The Art and Science of Persuasion 152 (Stan Stoga ed., Brown & Benchmark 1994). The use of evidence by the speaker is a factor that influences perceptions of credibility. One would expect that the use of evidence in a persuasive message would always yield increased results. In a complicated interaction of variables, researchers have found that the use of evidence by a highly credible persuader (e.g., Robert Redford) has negligible impact. In contrast, the use of evidence by a low credibility persuader (e.g., Jane Dull) can enhance attitude change. It seems that the highly credible person is so persuasive that the evidence produces little additional impact. Id.

[FN228]. Frank M. Eldridge, An Advocate's Use of Language, in Master Advocates' Handbook 22-23 (D. Lake Rumsey ed., 2d ed. 1988); see also Thomas Sannito & Peter J. McGovern, Courtroom Psychology for Trial Lawyers 168-69 (1985) (noting that, “[o]nce attorneys earn credibility, jurors will take advocates at their word and will ignore inconsistencies and rationalize weaknesses in the case”); Stern, supra note 221, at 28 (“It bears repeating: the personal rectitude of the attorney in the courtroom, as perceived by the jurors, is the most important weapon of a trial lawyer. It is bigger than the facts and bigger than the law ... the jurors will usually vote for the case of the lawyer they believe in.”); Waicukauski et al., supra note 216, at 31 (stating that “[a]n advocate who creates the impression that he or she is a person of honesty and integrity will have a considerable advantage over one who is perceived otherwise”); Nations, supra note 61. “The element of trustworthiness is a very important part of credibility. If an attorney appears untrustworthy, he or she becomes totally unable to persuade others.... Trustworthiness includes the perception of sincerity and honesty. If an advocate is to build the vital empathetic bridge between the client and the jury, trustworthiness of counsel must absolutely be established.” Id.

[FN229]. Caldwell, supra note 211, at 976. “Few missteps are more devastating than making misrepresentations to
the jury.” Id.


[FN231]. See id. at 422 (“Throughout a capital trial, good lawyers painstakingly construct a representation that substitutes for the defendant.”).

[FN232]. Haney, supra note 177, at 1468-69.

[FN233]. For instance, in one case the defendant was forced to wear a “stun belt” in front of the jury during both the guilt and sentencing phases of the trial. Stephenson v. State, 864 N.E.2d 1022 (Ind. 2007).

[FN234]. Caldwell, supra note 211, at 983.

[FN235]. See Doyle, supra note 230, at 447. “The representation of the [defendant] that emerges will not be this one, large strategic choice but of hundreds, even thousands, of smaller tactical decisions.” Id.

[FN236]. See Riggins v. Nevada, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring) (“At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial.”).


[FN238]. Whitman, supra note 10, at 272.

[FN239]. Id. at 273.


[FN241]. See id. at 1575-76 (finding that for many capital jurors, a defendant's denial of guilt in the face of incontrovertible prosecution evidence was what clinched their belief that the defendant was guilty).

[FN242]. If the prosecution evidence is weak, the defendant's testimony could serve to raise reasonable doubt in the minds of the jury or, at the very least, it presents another opportunity to further personalize the defendant.


[FN244]. See Roselle L. Wissler & Michael J. Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 Law & Hum. Behav. 37, 47 (1985) (concluding that “the presentation of the defendant's criminal record does not affect the defendant's credibility, but does increase the likelihood of conviction”).

[FN245]. See discussion infra part V.b.
[FN246]. See Sundby, supra note 240, at 1585.

[FN247]. See id. at 1573-74. (noting that remorse should be evaluated “not on whether the defendant wrings his hands with grief, but on whether he owns up to his actions in some manner and accepts some responsibility for what he has done”).

[FN248]. Id. at 1557.

[FN249]. See John Fabian Witt, Making the Fifth: The Constitutionalization of the American Self-Incrimination Doctrine, 77 Tex. L. Rev. 825, 919-20 (noting that an awkward defendant may actually damage their credibility by electing to testify).

[FN250]. See Id. at 919 (noting that uneducated defendants can be “caught in the vice of a powerful and potentially obfuscating cross-examination”).

[FN251]. See Joseph R. Dunn, Prescription for Death?: Psychotic Capital Defendants and the Need for Medication, 17 Cap. Def. J. 1, 22(2004) (“In a capital sentencing proceeding, the ability to control one's demeanor is even more important and may make a difference as to whether the defendant receives a sentence of death or life in prison.”).

[FN252]. See, e.g., Goodpaster, supra note 180, at 320.

[FN253]. Haney, supra note 177, at 1447 (discussing the twisting that has occurred in American psyche to create a more favorable environment to sentence a man to death).

[FN254]. See Brewer supra note 144, at 343 (noting that the prosecution has the opposite goal of dehumanizing the defendant and persuading the jurors that the defendant is incapable of “possessing basic human qualities such as empathy and kindness”).


[FN256]. See supra notes 31-36.

[FN257]. Discussion, supra part III.B-D.

[FN258]. See infra note 259.

[FN259]. See Nations, supra note 61.

The jury searches for and is impressed by an apparent relationship between the attorney and the client.” Id. Physical touching is a “nonverbal cue that can only be narrowly interpreted. It projects the attorney's belief in the client and the warm relationship that exists between them. Touching projects that the attorney, like the juror, has feelings about and empathy for human beings and their suffering.”

Id.

[FN260]. Id.

[FN261]. Id.
Jurisdictions have two approaches when determining what questions are permitted during voir dire. Id. The open approach allows a broad range of questions to be presented to prospective jurors. Id. On the other hand, the restrictive approach, which is increasingly common, only permit lawyers to question prospective jurors about their backgrounds and experiences. Id. Thus, under the restrictive approach, lawyers are not permitted to personalize their client.

Consequently, the lawyer “must focus on, and personalize” their client. Id. Significantly, personalizing your client can result in great benefits because people like to help people they like. Id.

Scott Cooper, Make Your Settlement Demands Persuasive, 42-Oct Trial 72 (2006) (emphasizing the importance of humanizing your client).

Id. (noting that the lawyer should refer to his client by stating his name).

Massachusetts Superior Court Criminal Practice Manual, Chapter 14, The Defendant's Case, CRIMP MA-CLE 14-I, (1999). “Many judges will not allow you to refer to your client by first name. At the same time, you do want to demonstrate that you respect your client, like him or her, and are not afraid of him or her.” Id.

Brewer, supra note 144, at 359 (finding that a “warm and friendly” attorney-client relationship positively effects a juror's perception of the defendant).

Id. (noting that the lawyer should refer to his client by stating his name).
[FN278]. See infra note 281. McGuire is considered the grandfather of inoculation theory. He was the first to draw the analogy to the medical sciences. McGuire reasoned that beliefs are vulnerable to persuasive attack by opposing arguments, and that people may protect themselves from attack through exposure to weakened forms of the attacking messages.


[FN280]. National Network for Immunization Information, Parents - Why Immunize? How Vaccines Work 1, http://www.immunizationinfo.org/parents/howVaccines_work.cfm (last visited Nov. 26, 2007). The immune system of a body that encounters a germ produces antibodies against the germ that help to eliminate it from the body. “The next time the person encounters the germ, the circulating antibodies quickly recognize it and eliminate it before signs of disease develop.” The report went on to say,

This is why a child who has had chickenpox will only rarely develop the Disease again. The immune system has memory. Medical experts estimate that the immune system can recognize and effectively combat hundreds of thousands, if not millions, of different organisms, or more. A vaccine works in a similar way. However, instead of one natural infection, for immunity to develop after a vaccine it usually takes several doses over several months or years. The vaccine contains an inactivated, weakened form of the germ, or a germ component. When introduced into the body, the dead or harmless germ causes an immune response without causing the disease. The immune system develops antibodies that will effectively kill or neutralize the germ if exposed to it in the future. The antibodies circulate in the bloodstream. Vaccination protects a child against infection with a germ without the child ever suffering through the disease.

Id.

[FN281]. William J. McGuire, The Effectiveness of Supportive and Refutational Defenses in Immunization and Restoring Beliefs Against Persuasion, 24 Sociometry 184, 184-97 (1961) (The research of McGuire and others has confirmed that inoculation builds persuasion resistance. Inoculation theory is based on the premise that a receiver has more reason to be involved with the message if two sides are presented. A one-sided message merely gives the receiver information that they can choose to not take seriously because it is “belaboring the obvious.”). See generally Kathleen Hall Jamieson, Dirty Politics: Deceptions, Distractions, and Democracy (1992) (arguing that in contexts where attitudinal challenges can be foreseen, inoculation may be used to preempt the challenges).

[FN282]. See generally id. at 193-94.


[FN284]. See Ayn E. Crowley & Wayne D. Hoyer, An Integrative Framework for Understanding Two-sided Persuasion, 20 J. Consumer Res. 561, 562-74 (1994) (stating that consumer research maintains that including mild attacking arguments (negative information), which are then refuted, strengthens positive brand cognitions. Negative information only needs to be refuted if it pertains to an important attribute. The use of correlated positive and negative messages regarding a product improves the message's effectiveness by enhancing the credibility of the positive claims); see also William J. McGuire, Resistance to Persuasion Conferred by Active and Passive Prior Refutation of the Same & Alternative Counterarguments, 63 J. Abnorma & Soc. Psychol. 326, 329-32 (1961).


[FN286]. See McGuire, supra note 281, at 206-08.

[FN287]. W.A. Watts & W.J. McGuire, Persistence of Induced Opinion Change and Retention of the Inducing
Message Contents, 68 J. Abnormal & Soc. Psychol. 233, 233-36 (1964). The warning serves to activate the receiver's existing defenses. The warning threatens the receiver and their beliefs. After being warned that a full-force attack is imminent the receiver begins to mentally prepare for the opponent's attack. The receiver immediately begins generating potential defenses and counterarguments against the forthcoming attack. Id.


[FN289]. Id. at 235.


[FN291]. See id.


[FN294]. See id.

[FN295]. Id. at 235.

[FN296]. Caldwell, supra note 184, at 1016-18. Failure to disclose harmful facts to your case leaves the jury with a shaky belief in the advocates' credibility. Id.

[FN297]. When disclosed by the advocate for the defendant, the jury is more likely to believe the scenario painted by defense counsel. Id.

[FN298]. See Peter L. Murray, Basic Trial Advocacy 166 (1995) (noting that if unfavorable facts are raised on direct examination rather than omitted, the jurors will not cast doubt as to the reliability of the image of the facts as presented by the direct examiner).

[FN299]. See Nietzel & Dillehay, supra note 226, at 141 (“Of the communicator variables that are important in court, credibility is probably paramount.”).

[FN300]. Waicukauski et al., supra note 216, at 32 (noting that, by voluntarily revealing that a used car was in an accident, a used car salesman is more likely to be believed about other things. Similarly, a lawyer who discloses bad facts up front appears more credible in the process).

[FN301]. See Caldwell, supra note 184 at 1017.

[FN302]. Id.

[FN303]. See Stern, supra note 221, at 171. Do not confine yourself to your side of a case. Do not put yourself in the position of counter-puncher. The jury must hear first from you anything that is harmful to your case - and not merely so that you will be able to give the explanation before the accusation has festered. It is vital that they hear it first from you so that your credibility ... is not undermined by the slightest suggestion that you attempted to conceal the unfavorable material and have
made up a response only after your adversary has dragged it to light.

Id.

[FN304]. See id.


[FN306]. Perrin et al., supra note 187, at 218 (stating “the advocate gains tremendous tactical advantage by having the first opportunity to shape how these [negative] facts will be perceived by the jurors.”).

[FN307]. See id. (“She who goes first has the opportunity to stamp her view on problematic facts. And if done well, that first view is difficult to change.”).

[FN308]. See id.

[FN309]. See supra notes 287-90 and accompanying text.

[FN310]. Caldwell, supra note 199, at 495-500. Disclosure permits the advocate to retain control over the “bad facts” of the case. Id. Choosing how and when to disclose “creates the impression that the advocate has nothing to hide.” Id. Furthermore, the presentation of the damaging evidence at defendant's choosing allows the advocate to recast the facts in less damaging light. Id. “[T]he disclosing party is able to characterize ... the information before opposing counsel can cast an ominous shadow over a case fact.” Id.

[FN311]. Caldwell, supra note 199, at 500.

[FN312]. Id. Ideally, the disclosure should neither come first or last. Id. The jury will be tainted if the admission is the first thing heard or the last thing left said. Id. To properly cast the fact in the light least damaging, the advocate must frame the “bad fact” in the proper context. See id.


[FN314]. See supra notes 214-230 and accompanying text.

[FN315]. Goodpaster, supra note 313, at 328.

[FN316]. Doyle, supra note 230, at 423.


[FN320]. Id. at 1192. Although it may seem like the most insignificant task of the capital defense attorney, it is critical that the attorney develop a relationship of trust with his client. Id. It is also critical that this relationship is one of openness and understanding. Id. Often times, defense attorneys do not have this relationship with their clients and it prevents important mitigation evidencing from surfacing - evidence that could be the difference between life and death. Id.

[FN321]. Id. Court-appointed attorneys may find these costs to be expensive, but this should not be an excuse to fail to do the investigation. Rather, the attorney must seek court-appointed assistance to ensure that this investigation into the crime and the defendant's life history is done properly. Id.


[FN323]. Doyle, supra note 230, at 423.

[FN324]. Goodpaster, supra note 313, at 329; see also White, supra note 318, at 357 (“By allowing the defendant to take contradictory positions at guilt and sentencing, the defense counsel loses credibility with the sentencer, thus reducing the defendant's chances for a life verdict.”).

[FN325]. Doyle, supra note 230, at 423.

[FN326]. Id.

[FN327]. Mitigation experts are often employed to assist in this task. Jonathan P. Thomes, Damned if You Do, Damned if You Don't: The Use of Mitigation Experts in Death Penalty Litigation, 24 Am. J. Crim. L. 359 (1997). Yet even when these experts are used counsel is cautioned to guide the investigation so that any mitigation evidence uncovered can be used in a way that is consistent with the overall defense strategy. Id. at 377-78.

[FN328]. Goodpaster, supra note 313, at 330.

[FN329]. A denial defense should probably only be considered if the case against the defendant is very weak. However, some capital defendants may insist, despite the evidence, that a denial defense is the only way to proceed. In these instances counsel must still make every effort to present mitigation evidence during the guilt phase. If counsel waits until the punishment phase it is likely to be too late.

[FN330]. Goodpaster, supra note 313, at 330.

[FN331]. Id. at 332.

[FN332]. Id. at 333.

[FN333]. See id. (“Ethically, counsel cannot simply manufacture defenses, but are limited by what their clients tell them; practically, they are limited by what the evidence will show.”).

[FN334]. See id.; see also Model Rules of Prof'l Conduct R. 3.3(a) (2006 ed.) (“A lawyer shall not knowingly ... make a false statement of fact or law to a tribunal ...”).
[FN335]. This further underscores the necessity of conducting a thorough mitigation investigation before the guilt phase has begun. See supra notes 321-23 and accompanying text.

[FN336]. Whitman, supra note 10, at 264 (noting a study wherein the authors concluded that jurors distanced themselves from a verdict of death in a variety of ways).


[FN338]. Id. at 1451-85.

[FN339]. See supra notes 253-72 and accompanying text.

[FN340]. Haney, supra note 337, at 1470.

[FN341]. Id. (“In California, for example, members of the public generally do not believe that life without parole means that the defendant will never be released from prison. Moreover, death-qualified respondents are significantly more likely to hold this mistaken belief.”).

[FN342]. Defense counsel may also try to present evidence regarding the “details about the pains of imprisonment and the severity of punishment it represents.” Id. at 1479.

[FN343]. Haney, supra note 337, at 1476.

[FN344]. Id. (quoting Joseph L. Hoffman, Where's the Buck? - Juror Misperception of Sentencing Responsibility in Death Penalty Cases, 70 Ind. L.J. 1137, 1138 n.11 (1995)). This lone holdout told his eleven colleagues that giving a sentencing recommendation of death was “the same as [if] you are [throwing the switch].” Id.

[FN345]. Haney, supra note 337, at 1477 (internal quotation marks omitted). Haney notes “that the details of the execution ritual are systematically hidden from [the jurors]” and “that most believe the event is unlikely ever to occur.” Id.

[FN346]. Id. at 1480.

[FN347]. See supra notes 253-272 and accompanying text.

[FN348]. Haney, supra note 337, at 1481-82.

[FN349]. Id. at 1481.

[FN350]. See discussion supra part III.A-D.

[FN351]. See supra notes 168-69 and accompanying text.

[FN352]. See discussion supra Parts III.A, V.A-C.

[FN353]. See discussion supra Part III.A.
[FN354]. See discussion supra Part IV.C.

[FN355]. See discussion supra Part IV.C.

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